No. 91-995

In The

Supreme Court of the United States

October Term, 1991

ROBERT J. DEL TUFO, Attorney General of New Jersey and C. GREGORY STEWART, Director, New Jersey Department of Law and Public Safety, Division on Civil Rights,

Petitioners,

v.

THE IVY CLUB, a New Jersey Corporation,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Third Circuit err when it recognized the validity of respondent's reservation under *England v. Louisiana State Bd. of Medical Examiners*, 375 *U.S.* 411 (1964), to return to federal court to present its federal issues, where for seven years prior to such reservation respondent unreservedly litigated the identical federal issues before a state administrative tribunal, which then ruled against respondent?

2. Does this Court's decision in *University of Tennessee v. Elliot*, 478 *U.S.* 788 (1986), preclude federal relitigation in a 42 *U.S.C.* § 1983 action of legal as well as factual determinations of a state administrative agency acting in a judicial capacity, where parties are afforded the opportunity to litigate federal claims and where there is the availability of appellate review?

3. Did the United States Court of Appeals for the Third Circuit err when, based on a "balancing of equities," it refused to order dismissal of respondent's federal complaint under the abstention doctrine of *Younger v. Harris*, 401 *U.S.* 37 (1971), even though it found that the prerequisites to *Younger* abstention existed in this twelve year-old matter, in which the comity interests underlying *Younger* were especially implicated?

4. Did the United States Court of Appeals for the Third Circuit err when it found that the affirmance by the Supreme Court of New Jersey of a New Jersey Division on Civil Rights Order, which in part pertained to

QUESTIONS PRESENTED – Continued

respondent's federal issues, did not constitute an adjudication by the New Jersey Supreme Court of such federal issues?

LIST OF PARTIES

The federal complaint filed by respondent The Ivy Club in 1986 named as defendants former New Jersey Attorney General W. Cary Edwards and former Director of the New Jersey Division on Civil Rights Pamela S. Poff. The United States Court of Appeals for the Third Circuit mistakenly retained this caption, even though on October 16, 1990, the District Court amended The Ivy Club's complaint to substitute defendants' successors in office, Robert J. Del Tufo, Attorney General of New Jersey, and C. Gregory Stewart, Director, New Jersey Division on Civil Rights, who are the petitioners before this Court (App. C at 66a). Sally Frank was a party to the proceeding below as intervenor-defendant and counter-claimant against The Ivy Club. Also, the Tiger Inn was a co-plaintiff with The Ivy Club in the 1986 proceeding before the District Court, but neither was a party to the appeal to the Court of Appeals for the Third Circuit below nor to the 1990 proceeding before the District Court.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 21, 1991 (concerning which a petition for rehearing was denied September 16, 1991).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 943 *F.*2d 270 (3d Cir.

1991) and is appended to this petition as Appendix A. The opinion of the United States District Court for the District of New Jersey is unreported; the District Court order is appended to this petition as Appendix C.

An earlier, related opinion of the District Court is reported at 636 *F. Supp.* 787 (D.N.J. 1986), and is appended to this petition as Appendix D. A related opinion of the Supreme Court of New Jersey is reported at 120 *N.J.* 73, 576 *A.*2d 241 (N.J. 1990), *cert.* den. ___ *U.S.* ___, 111 *S.Ct.* 799, 112 *L.Ed.*2d 860 (1991), and is appended to this petition as Appendix E. A related opinion of the New Jersey Division on Civil Rights is unreported, and is appended to this petition as Appendix F.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Third Circuit was entered August 21, 1991. The Court of Appeals for the Third Circuit denied a timely petition for rehearing, with suggestion for rehearing *en banc*, by an order dated September 16, 1991. This petition is, therefore, timely.

The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The statutes involved in this matter are the New Jersey Law Against Discrimination, at *N.J.S.A.* 10:5-12(f)

and 10:5-5(1); and 42 *U.S.C.* § 1983. The constitutional provision involved is the First Amendment of the United States Constitution. Because of the length of the state statutes, all these provisions are set forth in Appendix G.

STATEMENT OF THE CASE

The exhaustive procedural history of this matter is fully described in the decision below, *Ivy Club v. Edwards*, 943 *F.*2d 270 (3d Cir. 1991) (Appendix A) and in the related decision of the Supreme Court of New Jersey, *Frank v. Ivy Club*, 120 *N.J.* 73, 576 *A.*2d 241 (N.J. 1990), *cert.* den. *sub nom. Tiger Inn v. Frank*, ___ *U.S.* ___, 111 *S.Ct.* 799, 112 *L.Ed.*2d 860 (1991) (Appendix E at 77a-123a), and is summarized herein. In short, the decision of the Court of Appeals for the Third Circuit authorizes federal court relitigation of this matter despite over 11 years of state proceedings, involving numerous administrative decisions, two decisions by the Appellate Division of the Superior Court of New Jersey, and one decision by the Supreme Court of New Jersey.

This matter began in February 1979, when Sally Frank, a student at Princeton University ("Princeton"), filed a sex discrimination complaint against three eating clubs – The Ivy Club ("Ivy"), Tiger Inn ("Tiger") and the University Cottage Club (hereafter collectively referred to as "Clubs")* – which denied her membership because

* The Cottage Club settled with Ms. Frank in 1986. Princeton was also named in the original complaint and subsequently settled with Ms. Frank.

they excluded women. The complaint was filed with the New Jersey Division on Civil Rights ("Division"), created in the New Jersey Department of Law and Public Safety to prevent and eliminate discrimination proscribed by the New Jersey Law Against Discrimination ("LAD"), including discrimination in places of public accommodation. *N.J.S.A.* 10:5-6. Initially, the Division did not process Ms. Frank's complaint because of a belief that the Clubs were "distinctly private" and thus exempt from the LAD under *N.J.S.A.* 10:5-5(1) (App. A at 3a-4a).

In December 1979, Ms. Frank filed another complaint against the same parties, alleging that the Clubs were public accommodations because of their relationship to Princeton. Ivy's answer to this complaint stated as an affirmative defense that it was shielded from the reach of the LAD because of the First Amendment right to freedom of association.

In 1981, the Division determined after a brief investigation that it lacked jurisdiction over the Clubs. Ms. Frank appealed this decision to the Appellate Division of the Superior Court of New Jersey. Ivy filed a brief with the Appellate Division arguing against Division jurisdiction on the grounds that its "right to freedom of association should not be abridged." On August 1, 1983, the Appellate Division reversed, and remanded the case for further fact-finding by the Division (*id.* at 4a).

On remand, the Division proceeded to conduct an extensive investigation, which included the presentation of witnesses by the parties, and the submission of documentary evidence and affidavits. The parties also agreed

to 28 stipulations proposed by Ms. Frank and 177 proposed by respondents. Significantly, Ivy submitted various briefs extensively arguing its contention that the First Amendment prevented the State from enforcing the LAD against Ivy (App. A at 41a-42a; App. E at 81a-84a).

On May 14, 1985, the Director of the Division issued a finding of probable cause (App. F at 124a). The Director addressed at length the freedom of association claims raised by Ivy and other Clubs in the context of the extensive factual stipulations. Reviewing those claims in light of this Court's decision in *Roberts v. United States Jaycees*, 468 *U.S.* 609 (1984), the Director held that "[i]n balancing this compelling state interest [of prohibiting sex discrimination in a place of public accommodation] against the degree of protection from intrusion the Clubs are entitled to, . . . free association rights would not be violated by assertion of jurisdiction over these 'private clubs' that are integrally connected with Princeton University" (*id.* at 169a-174a).

The matter was then transmitted to the Office of Administrative Law, established pursuant to the New Jersey Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.* On December 12, 1985, the Administrative Law Judge ("ALJ") issued an initial decision granting Ms. Frank partial summary decision. On February 6, 1986, the Director of the Division affirmed the decision (incorporating her earlier ruling in the finding of probable cause which rejected the Clubs' First Amendment claims), but remanded to the ALJ for additional proceedings on damages.

Only thereafter, on February 13, 1986, did Ivy and Tiger file complaints in the United States District Court for the District of New Jersey, seeking injunctive and declaratory relief against defendants W. Cary Edwards, then Attorney General of New Jersey, and Pamela S Poff, then Director of the Division. Federal court jurisdiction was invoked pursuant to 42 *U.S.C.* § 1983. In their complaints, Ivy and Tiger raised identical claims of associational rights under the First Amendment (App. A at 6a-7a).

On March 21, 1986, defendants moved before the Hon. Robert E. Cowen, U.S.D.J., for dismissal (or, in the alternative, for a stay). Although the primary argument of defendants was that dismissal was mandated under the abstention doctrine of *Younger v. Harris*, 401 *U.S.* 37 (1971) and its progeny, the District Court explicitly declined to rule on the *Younger* issue. Instead, the District Court stayed Ivy and Tiger's action in favor of the ongoing state proceedings because of the "unsettled" state law issue. However, because Ivy and Tiger had already litigated their federal constitutional claims in the state proceeding, the District Court warned plaintiffs that they should "not erroneously rely on the stay granted by the court as a determination that they may return to federal court to adjudicate their federal constitutional claims" (App. D at 75a-76a).

Returning to the state proceeding, on July 29, 1986, in a hearing before the ALJ on remedies, Ivy for the *first time* orally stated that it wished to reserve its right to litigate its federal claims in federal court pursuant to this Court's decision in *England v. Louisiana State Board of Medical Examiners*, 375 *U.S.* 411 (1964). The ALJ issued an initial

decision on remedies on January 28, 1987, awarding damages to Ms. Frank but calling for severance by Tiger and Ivy of their ties with Princeton so that the Clubs would not be subject to the LAD. On May 26, 1987, the final order of the Division in this matter was issued by the Director, who increased the award for pain and humiliation damages to Ms. Frank, rejected the ALJ's recommendation that the Clubs sever their ties to Princeton,* and directed the Clubs to admit women as members. This order reaffirmed the earlier Division rulings on the Clubs' associational rights claim (App. G at 177a).

Ivy and Tiger appealed this decision to the Appellate Division of the Superior Court of New Jersey. Ivy's brief contained its first (and only) written "reservation" of its intent to litigate its federal issues in federal court under *England*. The Appellate Division partially reversed the Division order because certain material facts allegedly remained in dispute. *Frank v. Ivy Club*, 228 *N.J. Super.* 40, 548 *A.*2d 1142 (N.J. App. Div. 1990), rev'd 120 *N.J.* 73, 576 *A.*2d 241 (N.J. 1990), *cert.* den. *sub. nom. Tiger Inn v. Frank*, ___ *U.S.* ___, 111 *S.Ct.* 799, 112 *L.Ed.*2d 860 (1991).

The Supreme Court of New Jersey granted Ms. Frank's petition for certification. Ms. Frank, various *amici*, and Tiger addressed the First Amendment issue in briefs and in oral argument, although this issue was not addressed by Ivy. On July 3, 1990, the Supreme Court of

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* Despite its earlier oral "reservation," Ivy submitted a brief to the Director of the Division urging adoption of this proposed severance remedy because of freedom of association concerns.

New Jersey issued its decision, reversing the Appellate Division (App. E at 77a-123a). Although not discussing the freedom of association issue other than in the summary of the procedural history, the court reinstated the May 26, 1987 Division Order, which in turn had incorporated the earlier Division ruling on the Clubs' First Amendment claims (*id.* at 122a; App. G at 186a). The court rejected the arguments that alleged deficiencies in the Division's proceedings denied the Clubs due process. The court also discussed and rejected the Clubs' claim that they are "distinctly private" and thus not subject to the LAD (an issue intertwined with the First Amendment question). The New Jersey Supreme Court concluded that:

> The Clubs and Princeton, which is undisputably subject to LAD, have an integral relationship of mutual benefit . . . [This] interdependent relationship . . . deprives the Clubs of private status and makes them subject to the Division's jurisdiction. [App. E at 121a]

In affirming the order requiring the admission of women, the court emphasized that the "eradication of the 'cancer of discrimination' has long been one of our State's highest priorities." *Id.*

On August 24, 1990, Ivy moved before the District Court for the District of New Jersey to reopen its federal action based on the 1986 complaint. On September 7, 1990, defendants filed a cross-motion for dismissal based on (1) the ineffectiveness of Ivy's purported *England* reservation; (2) preclusion; (3) the *Younger* abstention doctrine; and (4) the *Rooker-Feldman* doctrine.

On September 17, 1990, the Honorable John C. Lifland, U.S.D.J., granted Ivy's motion and denied defendants' cross-motion for dismissal. The decision was based on Ivy's submission of a reservation under *England* to the state appellate courts, and on the alleged failure of the Supreme Court of New Jersey to address the federal issues. However, because the District Court expressed concern as to whether federal jurisdiction was appropriate in light of Ivy's unreserved litigation of its federal claims before the Division, on October 16, 1990, the District Court issued an Order certifying that the standards of 28 *U.S.C.* § 1292(b) for interlocutory appellate review had been met (App. C at 66a).

On October 1, 1990, Tiger filed with this Court a petition for a writ of *certiorari* to the Supreme Court of New Jersey, which solely focused on the First Amendment issue. This Court denied Tiger's petition on January 18, 1991 (App. A at 8a).

On October 24, 1990, the State defendants* filed a petition under 28 *U.S.C.* § 1292(b) to the Third Circuit to appeal the District Court order. This petition was granted on December 3, 1990 (App. B at 63a).

On August 21, 1991, the Third Circuit issued its decision. The Circuit panel majority expressly *agreed* with the State that Ivy's federal action "fell squarely within the parameters" of the *Younger* abstention doctrine (App. A at 15a). Nevertheless, the Circuit panel majority declined to order the District Court to dismiss Ivy's complaint

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* By this time, Sally Frank had successfully moved before the District Court to intervene as a defendant.

because a "balancing of the equities" weighed in favor of Ivy being given the opportunity to litigate its federal issues in federal court. *Id.* at 24a. In this equitable balancing, the Circuit panel majority emphasized that "[u]nreviewed state administrative proceedings cannot be considered a sufficient and fair opportunity to fully litigate Ivy's federal claims. . . . " *Id.* at 25a. The dissent argued that the District Court should have been ordered to dismiss the complaint because:

> Ivy waived *England* reservation of its § 1983 claims by unreservedly litigating the freedom of association issue, and having it decided in the state proceedings before attempting any *England* reservation; and by failing to notify the state administrative tribunal of its other constitutional arguments before that tribunal finally decided against Ivy. . . . [*Id.* at 32a, Nygaard, U.S.C.J., dissenting]

On September 3, 1991, the State defendants filed with the Third Circuit a petition for rehearing, with suggestion for rehearing *en banc*. On September 16, 1991, the Third Circuit denied this petition (App. I at 198a-199a).

Based on the decision below, on October 1, 1991, Tiger, whose *certiorari* petition (which raised the same federal issues as contained in Ivy's complaint) had been already denied by this Court, moved before the District Court to reopen its 1986 federal complaint. On November 4, 1991, relying on the language in the Third Circuit decision which stated that unreviewed state administrative proceedings cannot constitute full and fair litigation of federal claims, the District Court granted Tiger's motion to reopen its complaint. The District Court also

denied the State defendants' request that such decision be certified for appeal under 28 *U.S.C.* § 1292(b).

Thus, as a result of the decision below, after over twelve years of litigation, Sally Frank and the State (if unsuccessful in pending summary judgment motions) face the prospect of a District Court trial on Ivy and Tiger's federal claims.

ARGUMENT

I. THE *ENGLAND/PULLMAN* PROSCRIPTION AGAINST THE RELITIGATION IN FEDERAL COURT OF ISSUES AND CLAIMS WHICH HAVE BEEN UNRESERVEDLY LITIGATED AND DECIDED BY A STATE FORUM INCLUDES DECISIONS ON CONSTITUTIONAL CLAIMS RENDERED IN FULLY ADVERSARIAL AND JUDICIAL ADMINISTRATIVE ADJUDICATIONS HAVING DUE PROCESS INTEGRITY AND SUBJECT TO APPELLATE REVIEW.

As the Third Circuit majority noted, this case, with "all the trappings of a law school examination question" (App. A at 2a), involves "the boundaries" of several theories of abstention. *Id.* That at least one of those boundaries has been erroneously breached here is well stated by dissenting Circuit Judge Nygaard:

> If state litigants could successfully assert express or implied *England* reservations after they freely and voluntarily litigated their federal constitutional allegations and state tribunals rejected them, then litigants would be free to test their federal claims in state proceedings,

> and if unsuccessful there, get a second chance in § 1983 actions in federal district courts. Such an expansive interpretation of *England* would controvert the faith and credit federal courts must give to state decisions reviewed by courts, and result in repetitive, vexatious litigation. [App. A at 50a]

The decision under review permits Ivy to use *England* to appeal an adverse state decision, when it is eminently clear that the federal district court is not the appropriate forum to use for appeal, even where the federal claims would otherwise support jurisdiction. *District of Columbia Court of Appeals v. Feldman*, 460 *U.S.* 462 (1982).

The remedy which the court below bestowed on Ivy may be invoked only in the most circumscribed circumstances. Those circumstances were not present here. In *England v. Louisiana State Board of Medical Examiners*, 375 *U.S.* 411 (1964), this Court created a *limited* procedure whereby a litigant who is forced from federal court into state court under *Pullman* abstention can reserve the federal claims and return to federal district court for adjudication of those claims after the state court resolves the state law issue. *England*, however, "explicitly hold[s] that if a party freely and without reservation submits his federal claims for decision by the state court, litigates them there, and has them decided there, then – whether or not he seeks direct review of the state decision in [the Supreme] Court – he has elected to forgo his right to return to the District Court." *England, supra* at 419.

There is no dispute in this case that Ivy early on and *even before filing suit* in the District Court had already submitted its federal claims in the state proceedings,

albeit initially before an administrative body. Ivy raised its First Amendment free association claims as affirmative defenses in the Division and presented them to the Appellate Division (App. A at 4a, 40a-41a). Although the Appellate Division did not reach the First Amendment claims, the Division has unquestionably adjudicated those claims. *See,* App. A at 5a, 42a-43a. Furthermore, Ivy submitted its federal due process claims to the Administrative Law Judge and to the Director. *See,* App. A at 51a. Only when the due process claims and the First Amendment claims *were already decided adversely* to both plaintiffs Ivy and Tiger, did those plaintiffs then elect to seek a federal forum. At *no time prior to the adverse determinations in the state proceedings,* however, did Ivy take *any* action to reserve its federal claims for a federal forum. *England* reservation applies only "[w]here a plaintiff properly invokes federal court jurisdiction *in the first instance* on a federal claim" [emphasis added]. *Allen v. McCurry,* 449 *U.S.* 90, 101, n. 7 (1980). Hence, the Circuit Court erred in permitting Ivy any right to rely upon a purported reservation of its federal claims under *England.* It was ineffective *ab initio.**

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* Even assuming an initially effective *England* reservation, the right to return to federal court is not only clearly contingent upon a proper reservation of the federal claims, but it is irredeemably waived if the federal claims, as here, are litigated in the state proceeding, *before and after* the federal court abstention. *Lurie v. State of California,* 633 F.2d 786 (9th Cir. 1980); *Fisher v. Civil Service Commission of Salt Lake City, Utah,* 484 F.2d 1099 (10th Cir. 1973).

The Third Circuit's essential holding that the mere grant of abstention under *Pullman* (even where the federal plaintiff had previously litigated its federal constitutional claims in the state forum) necessarily implies an absolute right to return is a serious misapplication of *England*. As Circuit Judge Nygaard pointed out in dissent below:

> Only objectively ascertainable attempts to reserve made *before* a decision on the merits that would be avoided should be effective, even if that decision originated with a quasi-judicial tribunal. [943 *F.*2d at 296 (App. A at 60a); emphasis in original]

The decision here has no precedent *precisely because* it runs directly counter to *England*. It should never have arisen because this is just not an *England* case. It should have been dismissed by the Circuit Court under *Younger v. Harris*, 401 *U.S.* 37 (1971) (*see*, Point III, *infra*) or *University of Tennessee v. Elliott*, 478 *U.S.* 788 (1986). *See*, Point II, *infra*.

Instead, the Court below found that the New Jersey Supreme Court avoided the First Amendment issue entirely,* and went on to erroneously determine that the New Jersey appellate courts "appear to have acquiesced

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* While not discussing the First Amendment issue at length, the court did note that the Division in its opinion "rejected the argument that the Club members' constitutional free-association rights would be violated" if the Clubs were subject to the LAD. *Frank*, 120 *N.J.* at 92, 576 *A.*2d at 251 (App. E at 96a).

to Ivy's reservation."* (App. A at 22a). Because it so clearly misapprehended the import, elements and timing of *England*, the Court below equally clearly applied it erroneously.

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* The Court below made a significant and serious error of fact, upon which it relied, in finding that the New Jersey Supreme Court affirmed "only the order of the administrative body, not the Division's opinion" which decided the First Amendment issue. 943 *F.*2d at 281 (App. A at 23a). That perception is plainly wrong. On May 14, 1985, the Division Director issued a finding of probable cause (App. F), the decision which considered at length and specifically rejected Ivy's (and Tiger's) freedom of association claims in light of *Roberts v. United States Jaycees, supra* (App. F at 169a-174a). On May 26, 1987, the final order of the Division – the order from which the clubs appealed and which was before the New Jersey Supreme Court – was issued (App. G). It specifically incorporated and reaffirmed the earlier rulings on the clubs' associational rights claims (App. A at 46a, n. 15; App. G at 186a). The State court therefore necessarily affirmed the First Amendment discussion in the finding of probable cause by affirming this Division order. *See,* Dissent, 943 *F.*2d at 291 (App. A at 47a).

Moreover, the "inference of acquiescence" drawn by the Circuit Court here is no more supported by this record than is a directly contrary inference as to the meaning of the New Jersey Supreme Court affirmance. Where a state court has been informed of a reserved federal claim:

> . . . the parties cannot prevent the state court from rendering a decision on the federal question if it chooses to do so; and *even if such a decision is not explicit, a holding that the statute is applicable may arguably imply,* in view of the constitutional objections to such construction, *that the court considers the constitutional challenge to be without merit.* [*England, supra* 375 *U.S.* at 421, 11 *L.Ed.*2d at 448; (emphasis added)]

Most significant here is the Circuit Court majority's apparently dispositive blanket holding that "unreviewed* state administrative proceedings cannot be considered a sufficient and fair opportunity to fully litigate" federal claims in an abstention context. 943 *F.*2d at 282 (App. A at 25a). This flies in the face of well-established precedent of this Court and others, all of which evidence a growing recognition of the appropriate deference merited, in both *Younger* abstention and preclusion cases, by state administrative adjudications, so long as they are adequate to redress the constitutional claims, there is assurance of fairness in the process (*i.e.* "due process integrity"), they are "fully adversarial" and "judicial in nature," and particularly where subject to appellate review. *See, e.g., Astoria Federal Savings and Loan Assn. v. Solimino*, ___ U.S. ___, 111 *S.Ct.* 2166, 115 *L.Ed.*2d 92 (1991) (principles of *res judicata* and repose apply equally to court resolution of issues and to decisions by an administrative agency which acts in a judicial capacity); *Ohio Civil Rts. Comm. v. Dayton Christian Schools*, 477 *U.S.* 619 (1986) (action under 42 *U.S.C.* § 1983 for First Amendment violation dismissed because constitutional issue could be resolved by Ohio Civil Rights Commission with review by appellate court); *University of Tennessee v. Elliot*, 478 *U.S.* 788 (1986) (federal courts must in § 1983 actions give preclusive effect not only to state judicial decisions, but also to findings of state administrative agencies acting in judicial capacity);

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* The tacit suggestion here that the Division's determinations were not subject to state appellate review is belied by the record. *See also*, Dissent, 943 *F.*2d at 286, 288-291 (App. A at 34a, 46-48a).

Guild Wineries and Distilleries v. Whitehall Co., 853 *F.*2d 755, 758 (9th Cir. 1988) (*Elliot* preclusion rules extend to state administrative adjudications of legal and factual issues, even if unreviewed, so long as proceeding satisfies fairness concerns); *Williams v. Red Bank Bd. of Ed.*, 662 *F.*2d 1008, 1021 (3d Cir. 1981) (*Younger* abstention applied in significant part because New Jersey administrative proceeding – "a carefully constructed procedure" – was wholly adequate to address federal plaintiff's First Amendment challenge to the proceeding itself; "administrative" v. "judicial" characterization not dispositive). *See also* Dissent, 943 *F.*2d at 292 (App. A at 50a, ¶ 3).

In sum, *England* does not afford a litigant two bites at the apple. Where, as here, Ivy has elected to raise its federal claims before an appropriate state adjudicative forum and lost, and then freely elected not to argue before the state appellate courts the very claims it raised and saw rejected below, it may not subsequently relitigate those same issues in a federal court without doing violence to well-settled principles of finality and repose. *See, England*, 375 *U.S.* at 417-419.

Whatever the import of *England*, it was certainly never meant to allow a party in a multi-party litigation to (1) raise and argue its constitutional claims before a fully adversarial and judicial state administrative proceeding; and (2) having lost its arguments and received an adverse decision, seek a federal forum; and then (3) sit by as a mere "onlooker" while its co-plaintiff vigorously litigates on appeal through the state court system the identical constitutional challenge; and then, (4) when it is dissatisfied with the outcome, to return to the federal court to assert a second chance to argue its claims. There is no

principle which rewards such studied, strategic passivity, or which supports such an imposition on judicial economy and finality. The complaint should have been dismissed below. To the extent that the decision under review is in error, it should be reversed. Insofar as that decision has already been seriously misapplied, this Court's review is necessary to clarify the ruling in *England* and to preclude further circuit conflict and confusion.

II. EVEN ACCEPTING THE COURT OF APPEALS' FINDING THAT IVY'S FEDERAL ISSUES WERE ONLY DECIDED BY AN ADMINISTRATIVE AGENCY, THE AGENCY'S LEGAL AS WELL AS FACTUAL DETERMINATIONS SHOULD HAVE A PRECLUSIVE EFFECT ON THE DISTRICT COURT LITIGATION.

The full faith and credit statute, 28 *U.S.C.* § 1738, requires that a "federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which judgment was rendered." *Migra v. Warren City School Dist. of Ed.*, 465 *U.S.* 75, 81 (1984). *See also Kremer v. Chemical Construction Corp.*, 456 *U.S.* 461, 466 (1982). In particular, this Court has held that the full faith and credit statute and common-law preclusion rules require that federal courts give preclusive effect to state court judgments in § 1983 actions. *Allen v. McCurry*, 449 *U.S.* 90 (1980).

As argued in Point I, the Court of Appeals erred in finding that this matter involved an "unreviewed state administrative proceeding" (App. A at 25a). Instead, as in *Kremer*, this case concerns a state administrative decision

affirmed by a state appellate court. Under New Jersey law, which controls the preclusion question under *Migra*, Ivy would be unquestionably barred from relitigating the federal issues it actually litigated (or could have litigated) in the state proceeding. *See, e.g. Bernardsville Quarry v. Borough of Bernardsville*, 929 F.2d 927, 930 (3rd. Cir. 1991), *cert.* den. 60 *U.S.L.W.* 3057 (1991) (discussing New Jersey preclusion law).

Even accepting the Court of Appeals' mistaken characterization of this action as only involving an "unreviewed state administrative proceeding," the Court erred in not recognizing the issue preclusive effect of the Division's decisions on Ivy's federal claims. While the majority purports to apply this Court's decision in *University of Tennessee v. Elliot*, 478 *U.S.* 788 (1986), the majority does so in an unwarrantedly limited matter. Relying on *Elliot*, the Court held that in the District Court proceeding, the parties will be bound by stipulations filed in the state administrative proceeding, but can present "additional evidence pertinent to the resolution of the federal claims" (App. A at 29a-30a), despite the lengthy proceeding before the Division involving a 6,000 page record. Further, the decision below is silent as to the preclusive effect of the Division's factual conclusions relevant to the federal issues. Certainly, *Elliot* requires more than simply a recognition that parties are bound by stipulations made in the state proceeding.

More importantly, the decision below pointedly refuses to give preclusive effect to the *legal* determinations of the Division on Ivy's federal issues, despite the fact that these determinations were made in an adversarial hearing which met all due process requirements (as

expressly found by the New Jersey Supreme Court, App. E at 104a-122a), and in which the Division acted in a judicial capacity. While *Elliot* only involved the issue of the preclusive effect of state agency fact-finding, nothing in *Elliot* suggests that legal determinations of an agency are not entitled to preclusive effect as well. The principles underlying this Court's application of the common law preclusion doctrine to state administrative decisions apply equally to findings of fact *and* law. As this Court recently stated in *Astoria Federal Savings and Loan Assn. v. Solimino, supra:*

> We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *United States v. Utah Const. & Mining Co.*, 384 U.S. 394, 442, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966). Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. [*See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)] The principle holds true when a court

> has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, *see University of Tennessee v. Elliot*, 478 *U.S.* 788, 798 (1986), which acts in a judicial capacity. [*Id.*, 111 *S.Ct.* at 2169, 115 *L.Ed.*2d at 104]

Presuming that *Elliot* leaves open the question of whether state administrative adjudications of legal issues are entitled to preclusive effect in district court, petitioners respectfully submit that *certiorari* should be granted to decide this important question because of a conflict in the circuit courts of appeal. On the one hand, the Ninth Circuit has consistently held "that the federal common law rules of preclusion described in *Elliot* extend to state administrative adjudications of legal as well as factual issues, *even if unreviewed*, so long as the state proceeding satisfies the requirements of fairness outlined in *Utah Construction* [citation omitted]." *Guild Wineries and Distilleries v. Whitehall Co.*, 853 *F.*2d 755, 758 (9th Cir. 1988), *citing Eilrich v. Remas*, 839 *F.*2d 630, 632-35 (9th Cir. 1988) (emphasis added). As noted by the Ninth Circuit, this view "is supported by prominent commentators." *Guild Wineries, supra*, 853 *F.*2d at 758 n. 6, *citing, Restatement (Second) of Judgments* § 83 (1982); 4 Davis, *Administrative Law Treatise*, §§ 21.3, 21.9 (2d ed. 1983).

On the other hand, the Third Circuit (in the decision below) and the Court of Appeals for the Eighth Circuit have declined to apply *Elliot* to state administrative legal findings. *Peery v. Brakke*, 826 *F.*2d 740, 746 (8th Cir. 1987).

As this case vividly demonstrates, the principles of finality and repose – found by this Court in *Astoria*

Federal Savings and Loan Assn. to be the central judicial policies underlying *Elliot* – would be undermined if deference were only given to the fact-finding functions of administrative agencies, as most administrative determinations involve both factual and legal decision-making. As there is a clear conflict between the circuit courts of appeal on this significant preclusion question (the resolution of which would directly affect the outcome of this case*), it is respectfully requested that this Court grant this petition.

III. HAVING FOUND THAT IVY'S COMPLAINT FELL SQUARELY WITHIN THE PARAMETERS OF THE *YOUNGER* ABSTENTION DOCTRINE, THE COURT OF APPEALS ERRED IN ALLOWING REACTIVATION OF THIS MATTER BASED ON A "BALANCING OF THE EQUITIES." EVEN IF SUCH BALANCING WERE APPROPRIATE, THE EQUITIES STRONGLY FAVOR DISMISSAL OF THIS 12-YEAR-OLD ACTION.

Since the seminal case of *Younger v. Harris*, 401 *U.S.* 37 (1971), this Court has articulated a strong public policy against interference with state proceedings by federal courts by way of either injunction or declaratory judgment. Central to this policy are principles of comity and federalism, based on a recognition "of the proper respect

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* If the holding in *Guild Wineries* were applied to this matter, dismissal would be warranted, as New Jersey law recognizes the issue and claim preclusive effect of administrative factual and legal determinations. *See Hackensack v. Winner*, 82 *N.J.* 1, 32-33, 410 *A.*2d 1146, 1161-62 (N.J. 1980); *Taylor by Taylor v. Englehard Industries*, 230 *N.J. Super.* 245, 253, 553 *A.*2d 361, 365 (N.J. App. Div. 1989).

for the fundamental role of States in our federal system." *Ohio Civil Rights Commission v. Dayton Christian Schools, supra,* 477 *U.S.* at 626, *citing Younger, supra,* 401 *U.S.* at 44. *See also, Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 *U.S.* 423, 431 (1982).

While *Younger* involved a state criminal proceeding, it is firmly settled that the *Younger* doctrine applies to state civil actions and administrative proceedings of a judicial nature, so long as the proceeding is ongoing at the time of the filing of the federal complaint,* an important state interest is involved, and the federal plaintiff is not barred from raising the federal claim in the state proceeding. *Dayton Christian Schools, supra,* 477 *U.S.* at 627; *Middlesex, supra,* 457 *U.S.* at 431-432.

The most striking aspect of the Circuit panel majority decision is the express *acceptance* of defendants' claim – made repeatedly throughout this action** – that the

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* That state proceedings are no longer "ongoing" in this matter does not vitiate the applicability of *Younger,* as "the critical question" is "whether the state proceedings were underway before initiation of the federal proceedings." *Kitchen v. Bowen,* 825 *F.*2d 1337, 1341 (9th Cir. 1986), *cert.* den. 485 *U.S.* 934 (1988), *quoting, Fresh Int'l. Corp. v. Agricultural Labor Rel. Bd.,* 805 *F.*2d 1353, 1358 (9th Cir. 1989). *See also, Huffman v. Pursue,* 420 *U.S.* 592, 608-609 (1975) (*Younger* applied even though state trial completed and no state appeal pending); 17A Wright and Miller, *Federal Practice and Procedure,* § 4253 (2d ed. 1988) (dismissal under *Younger* appropriate if "a state proceeding to which *Younger* applies . . . is pending when the federal action is commenced . . . ").

** Contrary to the majority's implication (App. A at 24a), *Younger* abstention was the *primary* argument of defendants in their 1986 District Court motion to dismiss, and was a central basis of defendants' motion to dismiss before the District Court in 1990 as well.

District Court should have applied the *Younger* doctrine to this matter (*see* App. A at 15a, "the Clubs' request for an injunction pursuant to 42 *U.S.C.* § 1983 fell squarely within the parameters of the *Younger* decision"). Indeed, the majority recognized that the instant matter is remarkably similar to *Dayton Christian Schools*. As in *Dayton*, in this case a state administrative proceeding was ongoing at the time the federal complaint was filed, which involved the important state interest in eliminating sex discrimination, and in which Ivy's federal claims could have been (and in fact were) adjudicated. Also as in *Dayton*, this matter does not implicate any of the exceptions to the *Younger* doctrine – a state proceeding entailing harassment, bad faith, or a "flagrantly and patently" unconstitutional statute.* *Middlesex, supra*, 475 *U.S.* at 437; *Younger, supra*, 401 *U.S.* at 53.

That all the prerequisites to *Younger* abstention existed in this matter necessarily mandated dismissal of Ivy's complaint. This Court has squarely held that where a case falls within the parameters of the *Younger* doctrine, a federal court has "no discretion to grant injunctive relief." *Colorado River Water Cons. Dis. v. United States*, 424 *U.S.* 800, 816, n. 22 (1976). *Younger* "contemplates the

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* The only other exception recognized by this Court involves "extraordinary circumstances," constituting "great, immediate and irreparable injury," which warrant retention of federal jurisdiction. *Moore v. Sims*, 442 *U.S.* 415, 432-433 (1979); *Younger, supra*, 401 *U.S.* at 53. As this matter clearly does not meet this exacting standard (which has never been applied by this Court to save a case from dismissal), the decision below pointedly was *not* based on this (or any other) exception established by this Court to the applicability of *Younger*.

outright dismissal of the federal suit." *Gibson v. Berryhill*, 411 *U.S.* 564, 577 (1973). *See also*, 17A Wright and Miller, *Federal Practice and Procedure, supra.**

However, despite the Court of Appeals' recognition that this case falls directly within the *Younger* doctrine, the Court refused to order dismissal, and instead engaged in a wholly unprecedented "balancing of the equities" to retain federal jurisdiction of this matter (App. A at 24a). Petitioners respectfully submit that the decision of the Court of Appeals to permit district court relitigation of this case despite the admitted applicability of *Younger* – and despite the inapplicability of any of the doctrine's recognized exceptions – directly conflicts with the above-noted decisions of this Court which plainly require dismissal of the federal complaint.

Moreover, even assuming that it were appropriate for the Court of Appeals to engage in "equitable balancing," the equities weigh overwhelmingly in favor of terminating this 12-year old action. The primary basis for the majority's "equitable" finding is the alleged "detrimental reliance" by Ivy on the 1986 District Court decision, which purportedly prevented Ivy from having a "full and fair opportunity to litigate its federal claims" (App. A at 23a). This conclusion is unfounded. This Court

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* The one apparent exception is where the federal plaintiff has a cognizable claim for monetary damages which cannot be obtained in the state proceeding. In such a case, the district court can retain jurisdiction over the issue of monetary relief. *Deakins v. Monaghan*, 484 *U.S.* 193 (1988). Inasmuch as the decision below centered on authorization of federal litigation of Ivy's claims for injunctive and declaratory, not monetary, relief, *Deakins* has no relevance to this matter.

has clearly held that for abstention purposes, a party has had a "full and fair opportunity" to litigate a federal claim in a state administrative or judicial forum where state law does not bar the assertion of such claim in the state proceeding. *Pennzoil Co. v. Texaco, Inc.*, 481 *U.S.* 1, 14-16 (1987); *Dayton Christian Schools, supra*, 477 *U.S.* at 629. Obviously, Ivy was not prevented from appealing the Division determination on the constitutional issue to the Appellate Division of the Superior Court, the Supreme Court of New Jersey, and then to this Court by petition for a writ of *certiorari*.* That Ivy can no longer present its federal claims to the state appellate courts does not mean Ivy lacked a "full and fair opportunity" to litigate its federal claims in the state proceeding, as Ivy had the *ability* to raise its federal issues in the state forum. *See Pennzoil, supra*, 481 *U.S.* at 14-16 (§ 1983 action dismissed even though plaintiff alleged that state court could no longer hear its constitutional claims, as state law had not "barred presentation" of such claims); *Huffman v. Pursue, supra*, 420 *U.S.* at 611, n. 22 (federal complaint dismissed even though it was unclear whether plaintiff could still present his federal claim in the state appellate court, as plaintiff could have raised such claim on appeal after the adverse trial court decision). In fact, Ivy not only had the opportunity to raise its federal claim in the state proceedings, Ivy freely litigated such claims from 1979 through 1986 before both the Division and the Superior Court, Appellate Division (in the first of two Appellate Division proceedings).

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* Indeed, this is precisely what was done by Ivy's federal co-plaintiff Tiger.

Further, the majority's finding concerning Ivy's alleged "detrimental reliance" on the District Court's 1986 decision is contradicted by the plain language of that opinion. Judge Cowen warned Ivy and Tiger not to "erroneously rely on the stay granted by the court as a determination that they may return to federal court to adjudicate their federal constitutional claims," and "cautioned" the Clubs "not to interpret the court's decision to grant a stay as a ruling that they have properly reserved their federal constitutional claims for federal court adjudication pursuant to *England*" (App. D at 76a).

Just as insubstantial are the remaining equitable factors relied on by the Court of Appeals. The decision emphasized that defendants "failed to raise any objection to Ivy's *England* reservation in state court" (App. A at 24a). The majority's reliance on defendants' "failure to object" to a defective reservation in a state forum which neither had jurisdiction to determine, nor a record on which to review, the question of whether Ivy had rights under *England* to litigate in federal court is hardly a basis upon which to retain jurisdiction over an action which should otherwise have been dismissed. Defendants made the same reasonable assumption as Ivy's co-plaintiff, Tiger, understanding (particularly in light of Judge Cowen's admonitions) that the Clubs had waived their ability to reserve their federal claims for federal litigation (App. A at 58a-61a, Nygaard, dissenting). Finally, as discussed in Point I, the Court of Appeals' reliance on a finding of an implicit "acquiescence" to Ivy's reservation by the New Jersey Supreme Court is belied by the plain language of that court's decision (App. E).

In contrast, the equitable factors favoring dismissal are far more substantial, touching on essential policies articulated by this Court of comity, finality and repose. Thus, absent in the decision below is consideration of a central equitable principle underlying *Younger*, "avoid[ing] a duplication of legal proceedings . . . where a single suit would be adequate to protect the rights asserted." *Younger, supra,* 401 *U.S.* at 44.

Absent too in the decision's "equitable balancing" is any consideration of the comity principles underlying *Younger,* which militate against assuming federal jurisdiction where it would "reflect negatively" upon the willingness and ability of the state court to apply federal law faithfully. *Juidice v. Vail,* 430 *U.S.* 327, 336 (1977); *Huffman v. Pursue, supra,* 420 *U.S.* at 604. Unquestionably, federal district court relitigation of this matter – involving a lengthy administrative proceeding meeting due process requirements, with two reviews by the Superior Court, Appellate Division, and a final review by the New Jersey Supreme Court – would constitute a striking denigration of the State's ability to enforce constitutional guarantees.

Finally, absent in the decision's equitable balancing is any reference to important principles consistently articulated by this Court of finality and repose, which have obvious relevance to both the State and Sally Frank, who seek, after 12 years, vindication of the right to be free from gender-based discrimination. As stated in *Federal Department Stores v. Moitie,* 452 *U.S.* 394 (1981):

> This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be

> bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." [*Id.* at 401, quoting *Baldwin v. Traveling Men's Assn.*, 283 *U.S.* 522, 525 (1931)]

See also McCleskey v. Zant, ___ *U.S.* ___, 111 *S.Ct.* 1454, 1468-69, 113 *L.Ed.*2d 517, 542-543 (1991) ("One of the law's very objects" is finality, particularly implicated and undermined by a federal district court attack on a final state decision).

For these reasons, petitioners respectfully submit that the Court of Appeals erred in not ordering dismissal of the complaint under the *Younger* doctrine, putting an end to this litigation.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that this petition for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

(Filed – August 21, 1991)

United States Court of Appeals
for the Third Circuit

No. 90-6027

The IVY CLUB

W. Cary EDWARDS; Pamela S. Poff, Appellants,

Sally Frank, Intervenor-Defendant.

Sally FRANK, Counter-Claimant,

v.

The IVY CLUB, Counter-Defendant.

Argued May 9, 1991.

Decided Aug. 21, 1991.

As Amended Sept. 4, 1991.

Rehearing Denied Sept. 16, 1991.

Robert J. Del Tufo, Atty. Gen. of New Jersey, Andrea M. Silkowitz, Asst. Atty. Gen., Jeffrey C. Burstein (argued), William H. Lorentz, Deputy Attys. Gen., Div. of Law, Newark, N.J., for appellants.

Barbara Strapp Nelson (argued), McCarthy and Schatzman, P.A., Princeton, N.J., for appellee, The Ivy Club.

Nadine Taub (argued), Rutgers Women's Rights Litigation Clinic, Newark, N.J., for appellee, Sally Frank.

Sally Frank, pro se.

Before MANSMANN, NYGAARD and ROSENN, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circuit Judge.

This appeal, the procedural posture of which has all of the trappings of a law school examination question, requires us to explore the boundaries of the several theories under which the federal courts abstain from exercising their jurisdiction in deference to comity with the state courts. Specifically, the question presented is whether a party, who files a claim in federal court following a state administrative agency's determination that the federal constitution does not preclude the agency's exercise of jurisdiction, may return to federal court to litigate its federal claims after the completion of the state court proceedings in which it specifically refrains from raising its federal claims.

The Ivy Club ("Ivy" or "Club"), a social eating organization whose membership is drawn primarily from the student body of Princeton University, filed suit in the United States District Court for the District of New Jersey alleging that the exercise of jurisdiction by the New Jersey Division on Civil Rights, Department of Law and Public Safety (the "Division") violated its first amendment rights to freedom of association and its constitutionally guaranteed right to privacy. Following the federal court's stay of the federal suit, Ivy returned to the state court proceedings, but thereafter refrained from litigating its federal claims.

Upon termination of the state court proceedings, the district court reopened this case and, pursuant to 28 U.S.C. § 1292(b), certified to this court the order granting Ivy's motion to reopen its section 1983 action. We affirm the district court's order permitting Ivy to reopen the case because we hold that Ivy, in the unique circumstances we have here, sufficiently reserved its right to litigate its federal claims in federal court.

I.

Ivy, founded more than a century ago, is a social eating club with an active membership of less than eighty undergraduate students at Princeton University and approximately fifteen hundred inactive graduate members who formerly attended the University. The Club is one of thirteen eating clubs which provide meals to a portion of upper class Princeton students. Until recently, Ivy's membership was all male.

This litigation commenced in 1979 when Sally Frank, then a student at Princeton University, filed a complaint with the Division[1] against Ivy, as well as two other eating clubs, the Tiger Inn and the University Cottage Club ("the Clubs"), and Princeton University. Frank alleged that the Clubs and Princeton University discriminated on the

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[1] New Jersey created the Division on Civil Rights in the Department of Law and Public Safety to prevent and eliminate discrimination in the manner prohibited by the Law Against Discrimination; it gave the Division general jurisdiction and authority for such purposes. N.J.S.A. 10:5-6.

basis of sex in places of public accommodation in violation of the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 *et seq.*

The Division initially refused to process Frank's complaint, stating that it had determined that the Clubs were exempt from LAD because the Clubs were not places of public accommodation. LAD does not apply to "any institution, bona fide club, or place of accommodation, which is in its nature distinctly private." N.J.S.A. 10:5-5(*l*).

In December of 1979, Frank filed another complaint with the Division, this time alleging that the Clubs were places of public accommodations because they functioned as an arm of Princeton University. Ivy's answer to the complaint stated as a separate defense that Ivy "has the right to freedom of association pursuant to the First and Fourteenth Amendments of the United States Constitution." The Division dismissed Frank's complaint, holding that it lacked jurisdiction over the Clubs because of their distinctly private nature.

Frank appealed the dismissal of her complaint to the Appellate Division of the Superior Court of New Jersey. Once again, the Clubs raised the defense of freedom of association guaranteed by the United States Constitution. The appellate division, taking no position on the merits of the complaint, vacated the decision by the Division and remanded the case for further investigation, holding that a hearing and factual findings were necessary to determine whether the Division had jurisdiction.

After a number of procedural skirmishes not relevant to the dispute at hand[2], on February 6, 1986, the Division issued a Partial Summary Decision, holding that the Division had jurisdiction over the Clubs. The decision affirmed an earlier ruling of the Division in which the Director of the Division rejected the Club's argument that the exercise of jurisdiction by the Division violated their first amendment right to freedom of association. In a discussion covering six pages, the Director compared the Clubs and *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), and held that the application of LAD to the Clubs did not violate their constitutional right to freedom of association.

On February 13, 1986, following this final determination of jurisdiction at the administrative level, and having had its constitutional defenses against the exercise of jurisdiction rejected, Ivy and The Tiger Inn[3] filed suit in federal court. The complaint alleged that the exercise of jurisdiction by the Division of Civil Rights violated the Clubs' civil rights under the federal constitution and requested a declaratory judgment and an injunction

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[2] See *Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 *cert. denied, Tiger Inn. v. Frank*, ___ U.S. ___, 111 S.Ct. 799, 112 L.Ed.2d 860 (1991), for a complete review of the procedural history at the state level.

[3] The University Cottage Club settled with Frank on February 24, 1986. On July 22, 1986, Frank also settled with Princeton University. Princeton continued to participate in the proceedings because of the potential involvement it would have in whatever remedies were ultimately ordered by the Division.

against the state proceedings. The defendants were Attorney General W. Cary Edwards and Director of Civil Rights Pamela Poff. *Tiger Inn v. Edwards*, 636 F.Supp. 787 (D.N.J.1986).

The federal court chose to stay the federal action "until the New Jersey courts have clarified the application of the New Jersey Law Against Discrimination to the plaintiffs." *Tiger Inn*, 636 F.Supp. at 792. Although the plaintiffs requested the court to exercise its equitable powers in restraining the state proceedings, the court stayed the action pursuant to the *Pullman* doctrine, rather than the *Younger* doctrine.[4] The court explicitly declined to rule whether the plaintiffs were entitled to return to federal court upon the conclusion of the state proceedings. The court cautioned Ivy and Tiger Inn "not to interpret the court's decision to grant a stay as a ruling that they have properly reserved their federal constitutional claims for federal court adjudication pursuant to *England*."[5] 636 F.Supp. at 792.

The Ivy Club and Tiger Inn then resumed litigating at the state level. Ivy thereafter refrained from raising its federal constitutional claims in the state proceedings. It explicitly stated that it wished to reserve its right to litigate its federal claims in federal court pursuant to the *England* doctrine. Ivy reserved its rights under *England* orally before the Administrative Law Judge and again in

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[4] *See Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

[5] *See England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

its brief to the Appellate Division of the New Jersey Superior Court. As a part of its motion opposing certification to the Supreme Court of New Jersey, Ivy included its brief presented to the Appellate Division containing the *England* reservation. Tiger Inn, on the other hand, continued to present its federal claims in the state proceedings.

On July 3, 1990, the Supreme Court of New Jersey rendered its final decision. *See Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 (1990), *cert. denied, Tiger Inn v. Frank*, ___ U.S. ___, 111 S.Ct. 799, 112 L.Ed.2d 860 (1991). The court affirmed the Division's Order of May 26, 1987, awarded Frank humiliation damages in the amount of $5,000, but denied her club membership. It also ordered Ivy and Tiger Inn to admit women as members.

The decision, concerned primarily with the extent of hearings necessary to satisfy administrative due process, did not discuss federal constitutional claims. The only mention the New Jersey Supreme Court made of any federal constitutional claims was in its *summary* of the procedural history where the court noted that "[t]he Division rejected the argument that the Club members' constitutional free-association rights would be violated if the Clubs were subject to LAD." 576 A.2d at 251.

On August 24, 1990, Ivy moved to reopen its federal action based on the 1986 complaint. On October 15, 1990, the district court reopened this case and certified the question to this court under 28 U.S.C. § 1292(b)[6] whether

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[6] 28 U.S.C. § 1292(b) provides that "[w]hen a district judge, in making in a civil action an order not otherwise

(Continued on following page)

Ivy had waived its right to litigate its federal rights in federal court.

On October 1, 1990, Tiger Inn filed a Petition for a Writ of Certiorari with the Supreme Court of the United States, claiming the decision of the Supreme Court of New Jersey violated its first amendment rights. Although Ivy filed a motion for an extension of time to file its petition in the Supreme Court, Ivy never filed a petition. On January 18, 1990 the United States Supreme Court denied Tiger's petition for certiorari.

II.

A. *Mootness*

In the fall of 1990, Ivy formally inducted its first female members. The admission of women to the club raises the threshold question of whether this matter is moot. As is well established under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Lewis v. Continental Bank Corporation*, 494 U.S. 472, 110 S.Ct. 1249, 1253, 108 L.Ed.2d 400 (1990). This case-or-controversy requirement subsists

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(Continued from previous page)

appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such an order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order. . . . "

through all stages of the judicial proceedings, trial and appellate. *Id.*

Because this court has jurisdiction pursuant to 28 U.S.C. § 1292(b), the scope of appellate review extends only to questions of law raised by the order certified by the district court, *United States v. Stanley*, 483 U.S. 669, 677, 107 S.Ct. 3054, 3060, 97 L.Ed.2d 550 (1987). However, it is the order that is appealable, and not the controlling question; and thus we may address any issue necessary to decide the appeal before us. *Morse/Diesel, Inc. v. Trinity Industries, Inc.*, 859 F.2d 242, 249 (2nd Cir.1988). We must necessarily decide the issue of mootness because this court has a " 'special obligation' to satisfy itself of its own jurisdiction in every appeal presented to it." *McNasby v. Crown Cork and Seal Co., Inc.*, 832 F.2d 47, 49 (3rd Cir.1987), *cert. denied*, 485 U.S. 936, 108 S.Ct. 1112, 99 L.Ed.2d 273 (1988), citing *Bender v. Williamsport Area School District*, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986).

Ivy's admission of women raises the question of whether the present controversy is mooted. Certainly, if Ivy admitted women in order to comply with the order affirmed by the New Jersey Supreme Court, and hence did so involuntarily, the matter would not be mooted. However, if Ivy members have freely and voluntarily decided to change their club policy, then we must consider the question of mootness.

Although Ivy admitted women only after the final decision of the New Jersey Supreme Court holding that Ivy must admit women, and after the state and federal

courts denied Ivy's request for a stay, there are indications that at least part of Ivy's membership is in favor of admitting women. First, the club voted to admit women sometime prior to July of 1990, before the state court's final adjudication. *See Frank v. Ivy Club*, 576 A.2d at 253 n. 2. After the state court's final decision, Ivy members again voted to admit women. In light of the New Jersey Supreme Court's order that women be admitted, it would seem that holding a vote would be unnecessary as the outcome had been decided for them by the court.

There is therefore reason to believe that Ivy, regardless of the outcome of this litigation, has decided to revise its membership policy in favor of admitting women. If this were true, even if the court decided that Ivy does have a first amendment right to exclude women from their club, our decision would have no effect. Thus, the constitutional requirement of redressability would not be met; there must be a substantial likelihood that a favorable federal court decision will remedy the claimed injury. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

If Ivy does not intend to exercise the first amendment rights it alleges have been violated, a question that immediately comes to mind is why is Ivy pursuing this litigation. First, there might be internal disagreement within Ivy as to its admissions policy. Second, there exists practical. although not judicially cognizable, reasons for pursuing this federal litigation. The state court's order provides that Sally Frank may apply to the Director for attorneys' fees incurred in connection with this matter.

However, an interest in attorneys' fees does not save a matter from mootness. *Lewis v. Continental Bank*, 110 S.Ct. at 1255 (reasonable caution is needed to be sure that mooted litigation is not pressed forward solely to obtain reimbursements of attorneys' fees); *Diamond v. Charles*, 476 U.S. 54, 70-71, 106 S.Ct. 1697, 1707-08, 90 L.Ed.2d 48 (1986) (the fee award is wholly unrelated to the subject matter of the litigation, and the prospect that "continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under Article III").

In any event, we need not resolve the question whether Ivy admitted women voluntarily. Several other factors give considerable life to this controversy. First, the New Jersey Supreme Court upheld a $5,000 judgment against Ivy and Tiger Inn. If Ivy is correct in asserting that subjecting them to LAD violates its first amendment right to freedom of association, then a damage award based on violation of that law is impermissible. In addition, the Division has retained jurisdiction over the club to observe and require compliance with its orders that Ivy admit women in all future membership selections and that the women members will be accorded the same courtesies, privileges and accommodations as males. Ivy must also report in writing to the Division for the next two years on the number of women admitted. Under these circumstances, we conclude that the matter is not moot.

B. *Ivy's Right to Litigate in Federal Court*

In 1986, Ivy and Tiger Inn filed suit in federal court seeking a declaratory judgment and injunction against

the state proceedings, alleging that the Division's exercise of jurisdiction violated the Clubs' civil rights in violation of 42 U.S.C. § 1983. *See Tiger Inn v. Edwards*, 636 F.Supp. 787 (D.N.J. 1986). Because the plaintiffs requested that the federal court exercise its *equitable* powers to *restrain* ongoing state proceedings, the court should have decided the case under the parameters of the abstention doctrine laid out in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). However, at the State's urging, the court abstained pursuant to the *Pullman* abstention doctrine. *See Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The ramifications of that decision will be explored below.

Ivy and Tiger Inn's suit filed in federal court alleged that the defendants, Attorney General W. Cary Edwards and Director of Civil Rights Pamela Poff, were violating the clubs' right to privacy and freedom of association as protected by the first and fourteenth amendments. The Clubs brought suit pursuant to 42 U.S.C. § 1983 which provides:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, or any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Clubs alleged that the defendants' enforcement of the New Jersey Law Against Discrimination against them violated 42 U.S.C. § 1983 and requested that the defendants be enjoined permanently from implementing any

procedures to compel the Clubs to accept any person into its membership against the associational preferences of its members.

Section 1983 has engendered a great deal of discussion regarding the relationship between the federal and state courts. Originally § 1 of the Civil Rights Act of 1871, section 1983 was "enacted for the express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment.' " *Mitchum v. Foster*, 407 U.S. 225, 238, 92 S.Ct. 2151, 2160, 32 L.Ed.2d 705 (1972) (quoting 17 Stat. 13). Section 1983 was intended to alter significantly the relationship of the federal government to the states.

The Civil Rights Act of 1871, together with the Fourteenth Amendment, were "crucial ingredients in the basic alteration in our federal system accomplished during the Reconstruction Era." *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 503, 102 S.Ct. 2557, 2561, 73 L.Ed.2d 172 (1982). The Act and the constitutional amendment had the effect of dramatically changing the relationship between the federal and state judicial systems. They threw open the doors of the federal judicial system to lawsuits by private citizens to enable them to protect their federal rights. As a consequence of the new structure of law that evolved in the post-Civil War era, "the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established." *Mitchum v. Foster*, 407 U.S. at 239, 92 S.Ct. at 2160. Section 1983 now offered a "uniquely federal remedy" for vindication of individual rights violated "under the claimed authority of state law." *Id.* at 239, 92 S.Ct. at 2160. It purposely interposed the federal courts between the

States and the people "to protect the people from unconstitutional action under color of state law,'whether that action be executive, legislative, or *judicial*,' " *Id.* at 242, 92 S.Ct. at 2162 (quoting *Ex parte Virginia*, 100 U.S. 339, 346, 25 L.Ed. 676 (1880)) (emphasis supplied).

The Court has delineated the extent to which Section 1983 provides protection against involuntary participation in state court proceedings in *Mitchum v. Foster, supra,* and *Younger v. Harris, supra,* and its progeny. *Mitchum,* on the one hand, held that the federal anti-injunction statute, 28 U.S.C. § 2283, does not preclude a federal court from enjoining a state proceeding. The anti-injunction statute provides that a "court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or to effectuate its judgments." The Court reasoned that section 1983 fell within the expressly authorized exception of the anti-injunction statute. *Mitchum,* 407 U.S. at 243, 92 S.Ct. at 2162.

Younger and its progeny, on the other hand, have erected a formidable prudential barrier to obtaining injunctive relief from ongoing state adjudicative proceedings. In *Younger,* the plaintiff, who was being prosecuted under the California Criminal Syndicalism Act, sought a federal court injunction pursuant to § 1983 against the state criminal prosecution on the grounds that the existence of the Act and the prosecution under it violated the First and Fourteenth Amendments. The Court refused to grant the injunction, citing concerns of comity and

federalism.[7] 401 U.S. at 44-45, 91 S.Ct. at 750-51. The Court held that federal interference with state court proceedings was available only upon a showing of irreparable injury that is "both great and immediate." *Id.* at 46, 91 S.Ct. at 751.

Thus, although an injunction pursuant to section 1983 is not statutorily prohibited, *Younger* creates a separate and independent judicially created abstention doctrine.[8] The *Younger* abstention doctrine is a prudential limitation on the federal courts' exercise of jurisdiction when a plaintiff requests that a federal court interfere with ongoing state proceedings. Consequently, the Clubs' request for an injunction pursuant to 42 U.S.C. § 1983 fell squarely within the parameters of the *Younger* decision.

However, in 1986, when the district court considered the question of whether the Clubs' suit should be dismissed pursuant to *Younger*, the court expressed uncertainty as to whether *Younger* abstention should be applied to state administrative proceedings initiated by a private

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[7] In another decision handed down the same day, *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), the Court held that *Younger* deference was also applicable to a suit seeking only a declaratory judgment that the statute under which the federal plaintiff was being prosecuted was unconstitutional. Thus, *Younger* applies regardless of whether the plaintiff seeks injunctive or declaratory relief.

[8] Interestingly, *Mitchum* was decided after *Younger v. Harris*. The Court stated in *Mitchum*, 407 U.S. at 243, 92 S.Ct. at 2162, that it was not "question[ing] or qualify[ing] in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." The Court then made specific mention of *Younger* and its companion cases.

plaintiff. At that time, the Supreme Court had extended the *Younger* doctrine to civil proceedings initiated by the state in a state court in which important state interests were involved. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977); *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979). The Court had also applied *Younger* to state administrative proceedings initiated by the state in which important state interests were vindicated. *See Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973); *Middlesex County Ethics Committee v. Garden State Bar Assoc.*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982).

It was only after the district court first considered this case in 1986 did the Supreme Court consider the question of whether *Younger* abstention applied to administrative proceedings initiated by a *private plaintiff*. In *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986), a case factually similar to the one at bar, the state administrative proceedings were initiated by a private litigant filing a sex discrimination complaint with the Ohio Civil Rights Commission. Although the administrative proceedings were pending, Dayton (the defendant in the state proceedings), filed suit in federal court seeking an injunction against the state proceedings on the ground that any investigation or imposition of sanctions would violate the first amendment.

The Court held that it should abstain under *Younger* because "the elimination of prohibited sex discrimination

is a sufficiently important state interest to bring the present case within [*Younger* and its progeny]" and the Court had "no reason to doubt that Dayton will receive an adequate opportunity to raise its constitutional claims." 477 U.S. at 628, 106 S.Ct. at 2723. *Dayton* would thus appear to be controlling precedent for the case at bar. The present case also involves the issue of sex discrimination and there have been no allegations that the state courts would not provide an adequate opportunity to raise constitutional claims. Moreover, abstention in the present case might have avoided the necessity to reach a constitutional question. *Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1, 11, 107 S.Ct. 1519, 1526, 95 L.Ed.2d 1 (1987) (unwarranted determination of federal constitutional questions is a basis for abstaining pursuant to the *Younger* doctrine).[9]

Thus, in retrospect, with the additional guidance of *Dayton* and *Pennzoil*, it appears that abstention pursuant to the *Younger* doctrine would have been appropriate.[10] The defendants urge us to adopt this course of action presently and direct the dismissal of Ivy's action. However, fairness dictates that we must examine the circumstances under which the court in this case abstained and the effect of that decision on the litigants.

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[9] Commentators have criticized the *Pennzoil* decision as improperly blending *Pullman* and *Younger* abstention, *e.g.* Redish, Federal Jurisdiction 348 (1990).

[10] The defendants acknowledge that the district court erred in not applying the *Younger* abstention doctrine in the first instance. *See* dissent, at 286, n. 4.

The district court, in deciding not to abstain pursuant to *Younger*, instead accepted the defendants' argument and abstained pursuant to the *Pullman* theory of abstention. *Tiger Inn v. Edwards*, 636 F.Supp. at 790. Persuaded that this case was a classic situation for *Pullman* abstention, the court decided to "stay the action until the New Jersey courts have clarified the application of the New Jersey Law Against Discrimination to the plaintiffs." *Id.* at 792.

The *Pullman* abstention doctrine derives from *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). In that case, the Court established the principle that federal courts may abstain as a matter of policy from deciding a question of federal constitutional law when the challenged state law is unsettled and state resolution of the claim may make it unnecessary for a federal court to address the federal constitutional claim. Thus, under *Pullman*, a federal court may stay the federal proceedings until the completion of state court proceedings to decide an issue of state law which might moot a federal constitutional question.

Pullman abstention, however, is usually invoked when a plaintiff properly invokes federal court jurisdiction *in the first instance* on a federal claim. *Allen v. McCurry*, 449 U.S. 90, 101 n. 17, 101 S.Ct. 411, 418 n. 17, 66 L.Ed.2d 308 (1980). When the plaintiff meets federal jurisdictional requirements and initiates proceedings in federal court prior to any state proceedings, the federal court has a duty to accept that jurisdiction. *Id.* The federal plaintiff is relegated to the state court only for the resolution of the state law issue. Unlike *Younger* abstention,

Pullman, abstention "may serve only to postpone, rather than to abdicate, jurisdiction." *Id.*

The impropriety of applying *Pullman* in the present case is illustrated by the Clubs' inability to file suit in federal court prior to the commencement of state proceedings. Their federal complaint was that the state administrative proceedings *themselves* violated their federal constitutional rights. Neither could the Clubs have removed their state action to federal court; a defendant sued in state court on a state law cause of action cannot remove a case from state to federal court because of a defense based on federal law.[11] *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908) (A plaintiff's cause of action must be based on federal law in order for the case to arise under federal law for purposes of 28 U.S.C. § 1331.).

Thus, normally, unless an injunction could be obtained pursuant to the *Younger* doctrine, the state defendant in these circumstances would be constrained to present its constitutional defenses in state court. The Supreme Court has held that state-court judgments must be given both issue and claim preclusion effect to subsequent actions under 42 U.S.C. § 1983 by federal courts. *See Allen v. McCurry*, 449 U.S. 90, 104, 101 S.Ct. 411, 420, 66 L.Ed.2d 308 (1980) ("There is . . . no reason to believe that Congress intended [§ 1983] to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue *already decided* in state court simply

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[11] Removal of an action would be possible only under the limited circumstances provided in the Civil Rights Removal Act, 28 U.S.C. § 1443, which is not in issue in this case.

because the issue arose in a state proceeding in which he would rather not have been engaged at all."); *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) (Parties may not raise in federal court § 1983 litigation issues that *could have* been litigated in an earlier proceeding.).

Thus, we see that Congress' intention that § 1983 "throw open the doors of the United States courts," *Patsy v. Florida Board of Regents*, 457 U.S. 496, 504, 102 S.Ct. 2557, 2561, 73 L.Ed.2d 172 (1982) (quoting remarks of Rep. Lowe), to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights does not hold true for the party who is a defendant in state proceedings alleging that the state proceedings are in violation of his federal rights. Unless the formidable barrier of the *Younger* abstention doctrine can be surmounted by a defendant in a state proceeding or removal is available under the Civil Rights Removal Act, that defendant must have his federal rights adjudicated by the state court system subject to review only by the Supreme Court of the United States.

To summarize, the distinction between *Pullman* and *Younger* abstention arises from the different procedural posture of a case where the federal litigation is initiated as a defense to ongoing state proceedings and a case where the plaintiff properly invokes federal jurisdiction in the first instance.[12] In the former, the *Younger* doctrine

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[12] The Supreme Court noted this distinction in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619,

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is utilized when the federal court is requested to enjoin ongoing state proceedings. In the latter, the *Pullman* abstention doctrine is utilized when the plaintiff properly invokes the federal jurisdiction in the first instance and the federal court temporarily abstains from exercising its jurisdiction pending the state court decision on a state law question.

For our purposes, the most important consequence of district court abstention pursuant to *Younger* rather than *Pullman* is that although a decision under *Younger* terminates the federal litigation (or ends the state litigation if the federal plaintiff is successful), abstention under *Pullman* merely postpones the exercise of federal jurisdiction. *Allen v. McCurry*, 449 U.S. at 101 n. 17, 101 S.Ct. at 418 n. 17. A federal plaintiff who is remitted to state court pursuant to *Pullman* need not relinquish the right to litigate federal claims in federal court; that right may be reserved especially by following the dictates of *England v. Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

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106 S.Ct. 2718, 91 L.Ed.2d 512 (1986). In *Dayton*, the Court explained that the application of the *Younger* principle to pending state administrative proceedings was not inconsistent with *Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), which holds that litigants need not exhaust their administrative remedies prior to bringing a § 1983 suit to federal court. The Court reasoned that in *Dayton*, unlike *Patsy*, the administrative proceedings were *"coercive rather than remedial, began before any substantial advancement in the federal action took place,* and involve[d] an important state interest." *Dayton*, 477 U.S. at 628 fn. 2. 106 S.Ct. at 2723 fn. 2 (emphasis supplied).

When the district court abstained pursuant to *Pullman*, the court expressly did not decide whether the Clubs were able to return to federal court following the termination of the state court proceedings. The court, understandably troubled by Ivy's litigation of its federal constitutional claims in the state administrative proceedings, cautioned the Clubs "not to interpret the court's decision to grant a stay as a ruling that they have properly reserved their federal constitutional claims for federal court adjudication pursuant to *England*." *Tiger Inn v. Edwards*, 636 F.Supp. at 792.

The record before us unequivocally demonstrates that Ivy's constitutional claims have not been adjudicated other than at the state administrative level. Subsequent to the district court's decision to abstain, Ivy refrained from litigating its federal constitutional claims. Ivy also expressly stated its wishes to preserve its right to litigate in federal court pursuant to *England* at each subsequent stage of the state court proceedings.

Moreover, the New Jersey courts appear to have acquiesced to Ivy's reservation of its right to litigate its federal claims in federal court. Although the New Jersey courts did not explicitly acknowledge Ivy's reservation under *England*, neither did the state court decide Ivy's constitutional defenses. *See Frank v. Ivy Club*, 228 N.J. Super. 40, 548 A.2d 1142 (1988); *Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 (1990). The only mention any state court made of Ivy's first amendment claims was the New Jersey Supreme Court's summary of the procedural history of the case. The court's recognition that the first amendment claim had been decided at the administrative level hardly constitutes the adjudication of Ivy's first amendment

claims. The New Jersey Supreme Court affirmed only the order of the administrative body, not the Division's opinion containing the first amendment discussion issued in conjunction with that order.

We therefore are faced with the situation where confronted by a *Pullman* abstention, Ivy chose not to pursue its federal claims in the state court. The state court apparently had no objection to that reservation. Ivy, thus, has not had a full and fair opportunity to litigate its federal claims. The Supreme Court has repeatedly recognized that the collateral estoppel doctrine cannot be applied when a party did not have a "full and fair opportunity" to litigate an issue in the earlier proceeding. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 480-81, 102 S.Ct. 1883, 1896-97, 72 L.Ed.2d 262 (1982); *Allen v. McCurry*, 449 U.S. at 101, 101 S.Ct. at 418. Thus, the full faith and credit statute[13] does not bar the federal court's adjudication of Ivy's federal claims.

The defendants argued, however, that Ivy did indeed possess a full and fair opportunity to litigate its federal claims in state court and that Ivy voluntarily waived that right. The simple answer is that the court, having granted abstention specifically pursuant to *Pullman*, repeatedly put Ivy in a "catch-22" situation by not deciding the reservation issue at that time. If Ivy wished to return to

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[13] The federal full faith and credit statute, 28 U.S.C. § 1738, provides that "judicial proceedings [of any court of any State] shall have the same full faith and credit in every court with the United States and its Territories and Possessions as they have by law or usage in the courts of such State. . . . "

federal court, Ivy had to refrain from presenting its federal claims at the state level. Under *England*, a party who freely and without reservation submits his federal claims for decision by the state courts waives the right to litigate its federal claims in federal court. *England*, 375 U.S. at 419, 84 S.Ct. at 467. Thus, if Ivy had any hope of benefitting from the court's decision to defer its exercise of jurisdiction rather than dismiss the case, Ivy necessarily had to refrain from litigating its federal issues in state court.[14]

We are therefore left with a balancing of the equities. Ivy, on the one hand, detrimentally relied on the district court's decision to stay this action. As a result, there has been no adjudication of Ivy's federal claims to date. The State, on the other hand, has been litigating this case for over ten years and, had the State successfully presented the *Younger* abstention, it could have ended the litigation. We are less troubled, however, by any perceived unfairness to the defendants because of two factors: First, it was in response to the defendants' urging that the court abstained under *Pullman*. *Tiger Inn v. Edwards*, 636 F.Supp. at 789. Second, at least on the record before us, the defendants failed to raise any objection to Ivy's *England* reservations in the state court.[15] Accordingly, a sense of basic

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[14] We note that the parties could have sought a clarification of this issues on appeal. However, neither side did so and accordingly, we do not assess the failure to appeal as detrimental to either side.

[15] *Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064 (3rd Cir. 1990), presented this court with an analogous situation. In *Bradley*, unlike Ivy, the plaintiff initiated state

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fairness dictates that Ivy be permitted to litigate its federal claims in the federal forum. Unreviewed state administrative proceedings cannot be considered a sufficient and fair opportunity to fully litigate Ivy's federal claims, the merits of which we do not reach.

The dissent disagrees with our holding that Ivy has been deprived of a full and fair opportunity to litigate its federal claims, arguing that this case should be treated as a straightforward *Pullman/England* case. The dissent would prefer that we ignore the procedural history of this case, stating that even if the *Pullman* abstention were incorrect, it has become "the law of the case." The law of

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proceedings to have his state claims adjudicated after having filed his claim in federal court. In effect, the plaintiff "voluntarily" submitted himself to state court instead of having the federal court make the decision, the normal procedure under *Pullman*. Throughout the state proceedings, the plaintiff reserved his right to return to federal court pursuant to *England*. The court held that where (1) the plaintiff initiates an action in federal court, (2) the plaintiff appeals the termination of his employment through state prescribed procedures while explicitly reserving his federal claim, (3) both the defendant and the state tribunal acquiesce in the reservation, and (4) the federal action is stayed pending the outcome of the state proceeding, the reservation of the plaintiff's federal claims for federal adjudication must be recognized. *Id.* at 1072.

Although *Bradley* is distinguishable from the case at bar in that the plaintiff filed first in federal court and did not have his federal claims adjudicated at the administrative level, *Bradley* does provide us with some guidance. *Bradley* demonstrates that in deciding whether an *England* reservation is valid, the actions of the other party and state court are relevant to the determination.

the case argument, however, supports the majority view for it validates the exercise of equitable principles under the unique circumstances of this case. However, were we just to assume that the *Pullman* abstention was the "law of the case" and not discuss its inappropriate use in the situation we have here, nothing would discourage, or indeed, prevent future parties from relying on it as binding precedent.

The omission of any discussion of the impropriety of applying *Pullman/England* abstention in the present case could mislead future state court defendants into believing that they always have an opportunity to litigate their federal claims in federal court. According to the dissent, Ivy may not return to federal court to litigate its federal claims because it did not sufficiently reserve its *England* rights in the state administrative proceedings pertaining to jurisdiction. Following that argument to its logical conclusion, one would conclude that had Ivy only raised its *England* reservations from the moment it was summoned in the state administrative proceedings, Ivy could come into federal court to have its federal claims decided on the basis that Ivy had sufficiently reserved its rights under *England*.

Under the jurisprudence as it stands today, that is not the law. As we discuss *supra* at 280, federal courts must give state-court judgments both issue and claim preclusion effect in subsequent actions under section 1983. Section 1983 did not give state-court defendants the unrestricted right to litigate their federal rights in federal court. *See Allen v. McCurry*, 449 U.S. at 103, 101 S.Ct. at 419 (no authority for proposition that every person asserting a federal right is entitled to one unencumbered

opportunity to litigate that right in federal district court, regardless of the legal posture in which the federal claim arises). The state-court defendant may successfully invoke federal court jurisdiction only if the defendant successfully amounts the *Younger* bar to obtaining an injunction of the state court proceedings or if removal is available pursuant to the Civil Rights Removal Act.

Notwithstanding, having sought injunctive relief immediately upon the final decision of the state administrative agency on the question of jurisdiction and having been the beneficiary of a *Pullman* abstention, although erroneously granted, Ivy should not be deprived of subsequent access to the federal court at the conclusion of the state court proceedings in which it refrained from litigating its federal claims. The dissent dismisses this proposition, stating that it is "without precedent." It is hardly surprising that no court has encountered the anomalous situation presented here. That no court has decided what should happen under these unique circumstances does not mean that we can not, or should not, decide the case according to the dictates of justice. A court should not mechanistically apply precedent and when finding none to fit the case at bar, throw up its hands and state that the equitable issues may not be explored.

Rightly or wrongly, the district court retained jurisdiction in this case and did not preclude Ivy from returning to federal court. On the contrary, it held out the opportunity for Ivy to return. It is meaningless to retain jurisdiction just to rule at a later date that Ivy never had any right to return to federal court. Ivy's detrimental reliance on this judicial grant of jurisdiction resulted in a

loss of its full and fair opportunity to litigate its federal claims in the state court.

In sum, to analyze the case as if it were a straightforward *England* case not only deprives Ivy of its full and fair opportunity to litigate its federal claims because of the district court's decision to retain jurisdiction, it also misleads future state court litigants to believe that if only they are more "effective" than Ivy in making its *England* reservation, every state court defendant has a right to litigate its federal claims in federal court. We discussed the distinction between *Younger* and *Pullman* abstention to illustrate that state defendants normally do not have the right to invoke a *Pullman* abstention.

We next turn to the question of whether the state proceedings should be given any preclusive effect at all. Normally, when the federal court abstains pursuant to *Pullman* and the federal litigant reserves his rights as required by *England*, issue preclusion applies only to the state law question decided by the state court. Upon return to federal court, the federal plaintiff may fully litigate his federal claims, including the factual issues that may be identical to those underlying the state law question. *England*, 375 U.S. at 417, 84 S.Ct. at 466 ("[I]n cases where, but for the application of the [*Pullman*] abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination.")

However, in the present case, the federal court will now hear Ivy's federal claims, not because Ivy was unwillingly subjected to the state court after properly invoking federal jurisdiction in the first instance, the

normal *Pullman* situation, but because the application of *Pullman* abstention deprived Ivy of a full and fair opportunity to litigate its federal claims. The equitable considerations that require the federal court to decide Ivy's legal questions do not also require that Ivy be given a chance to relitigate the extensive factual findings of the state court.

The decision to give preclusive effect to the state court's factual findings eliminates any possibility of conflict with the Supreme Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986). There the Court reasoned that Congress, in enacting the Reconstruction Civil Rights statutes, did not wish to foreclose the adaptation of traditional principles of preclusion. *Id.* at 797, 106 S.Ct. at 3225. The Court concluded that the conservation of judicial resources and the value of federalism are served by giving "preclusive effect to state administrative factfinding rather than leaving the courts of a second forum, state or federal, free to reach conflicting results." *Id.* at 799, 106 S.Ct. at 3226.

The New Jersey Supreme Court's decision in this matter, *Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 (1990), makes it unnecessary to remand to the district court to decide the preclusive effect to which the Division's factfinding would be entitled in state court. The parties will be bound by the undisputed stipulations of fact. The parties, however, will not be bound by the eighteen disputed facts determined to be immaterial by the state court. The state court did not decide whether procedural due process was satisfied as to the resolution of these eighteen facts; thus, the parties cannot be bound by them. *See Frank v. Ivy Club*, 576 A.2d at 257. Of course, the

parties are not precluded from presenting additional evidence pertinent to the resolution of the federal claims.

The dissent also argues that Ivy's litigation in federal court is barred by the *Rooker-Feldman* doctrine and the Full Faith and Credit Statute, 28 U.S.C. § 1738. However, these barriers apply to *state court* decisions, as opposed to state administrative decisions. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 1315, 75 L.Ed.2d 206 (1983) ("United States District Court has no authority to review final judgments of a state *court* in judicial proceedings.")[16] (emphasis supplied); *University of Tennessee v. Elliott*, 478 U.S. at 794, 106 S.Ct. at 3223 (28 U.S.C. § 1738 is not applicable to the unreviewed state administrative proceedings). As noted earlier, the New Jersey state courts implicitly observed Ivy's *England* reservation and accordingly did not decide Ivy's federal constitutional claims.[17] Thus, *University of Tennessee v. Elliott*, which addresses the preclusive effect of unreviewed state administrative decisions, is more to the point and permits review here by the district court. As already noted, *Elliott* holds that in section 1983 actions, federal courts must

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[16] When a United States district court is assessing the validity of a rule promulgated in a state non-judicial proceeding, it has subject matter jurisdiction because this does "not require review of a *final state-court judgment* in a particular case." *Feldman*, 460 U.S. at 486, 103 S.Ct. at 1317 (emphasis added).

[17] The dissent contends that we ignore New Jersey's entire controversy doctrine. However, that doctrine is applicable to federal courts only by virtue of the Full Faith and Credit Statute. Thus, the foregoing discussion of the Full Faith and Credit Statute subsumes any discussion of the New Jersey entire controversy doctrine.

give the state administrative agency's factfinding the same preclusive effect to which it would be entitled in the state's courts. *Id.* 478 U.S. at 799, 106 S.Ct. at 3226.

As the dissent recognizes, the district court only certified the question of whether Ivy had properly reserved its section 1983 claims under *England*. There was no need to certify the *Rooker-Feldman* question because if Ivy has rights under *Pullman/England*, *Rooker-Feldman* is irrelevant. "If Ivy made valid reservations . . . , then the district court would have jurisdiction to hear these claims irrespective of the *Rooker-Feldman* doctrine." Dissent, at 293, n. 18.

III.

In sum, in response to the question certified to this court, we hold that in the face of the *Pullman* abstention exercised by the district court followed by Ivy's reliance on that abstention in the reservation of its right to litigate federal claims in federal court and not present them in the state proceedings, Ivy has neither waived nor had a full and fair opportunity to litigate its federal claims. Accordingly, we will affirm the district court's order permitting Ivy to litigate its section 1983 action in federal court.

NYGAARD, Circuit Judge, concurring and dissenting.

I respectfully concur in part and dissent in part. I agree with the majority's opinion that this case is not

moot, but I disagree with its *England* analysis.[1] I conclude that Ivy waived *England* reservation of its § 1983 claims by unreservedly and voluntarily litigating the freedom of association issue, and having it decided in the state proceedings before attempting any *England* reservation; and by failing to notify the state administrative tribunal of its other constitutional arguments before that tribunal finally decided against Ivy on jurisdictional and liability grounds.

I would hold that all of Ivy's § 1983 claims must be dismissed by the district court. Without a valid *England* reservation, the *Rooker-Feldman* doctrine divests the district court of subject matter jurisdiction over Counts One and Two of Ivy's complaint. If the district court hears those counts, it would in effect be undertaking impermissible lower federal court review of the New Jersey Supreme Court's decision in the *Frank* case. As for Count Three, it is barred by New Jersey's entire controversy doctrine because Ivy did not raise it in the first instance in the state proceedings.

I find no precedent for the majority's view that this appeal turns on equitable considerations, rather than Ivy's clear failure to make timely and effective *England* reservations. Furthermore, even if the majority is correct that Ivy made valid *England* reservations, the majority is

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[1] Also, I do not join the majority's conclusion that the district court should have dismissed Ivy's complaint under *Younger* when that complaint was first brought. Since the district court did not reach *Younger*, its *Pullman* abstention is the law of the case. I think the majority's discussion of *Younger* is unnecessary dicta.

wrong that Ivy is nevertheless bound by state findings of fact. *England* guarantees a federal trial *de novo* of all facts material to a party's reserved constitutional claims, state findings of fact notwithstanding.

I.

Ivy's § 1983 complaint, App. 82-92, consists of three counts. Each count alleges that the exercise of jurisdiction by New Jersey's Department of Law and Public Safety, Division on Civil Rights ("Division") over Ivy pursuant to New Jersey's Law Against Discrimination ("LAD"), *N.J.S.A.* 10:5-1 *et seq.*, is unconstitutional.

Count One alleges the Division's assertion of jurisdiction denies Ivy its First Amendment right of free association. Count Two alleges the administrative process which resulted in the Division's exercise of jurisdiction deprived Ivy of its federal constitutional right to procedural due process. Count Three asserts the LAD is unconstitutionally "void for vagueness" – that is, the statute fails federal due process requirements because it lacks ascertainable standards for determining whether Ivy and other clubs like Ivy are public accommodations – and therefore leaves New Jersey officials with "uncontrolled discretion" to hold "such a club as [Ivy] to be a public accommodation contrary to the Fifth and Fourteenth Amendments' due process requirements." App. 91.

Ivy's three count complaint was first brought against the defendant-appellants, New Jersey's Attorney General and the Director of the Division, *after* the Division finally decided, in the course of fully adversarial proceedings, that it could assert jurisdiction over Ivy under the LAD.

The Division's final jurisdictional determination incorporated an express rejection of Ivy's First Amendment freedom of association argument. Thus, Ivy filed its federal complaint after the Division considered and rejected Ivy's First Amendment argument, but before conclusion of other Division proceedings in this case, that is before the Division held Ivy liable for sex discrimination and subject to an order of damages and remedies.

Given the pendency of the state proceedings, the district court stayed Ivy's federal action on *Pullman* abstention grounds. The *Pullman* stay gave New Jersey tribunals an opportunity to decide state law questions in Frank's case which might make it unnecessary to reach Ivy's federal constitutional allegations.[2]

After suffering adverse jurisdictional, liability, damages and remedies decisions by the Division, Ivy unsuccessfully appealed to New Jersey appellate courts. Ultimately, Ivy lost before the New Jersey Supreme Court, which affirmed the Division's decision that Ivy was subject to the Division's jurisdiction under the LAD and held that the administrative procedures followed by the Division with respect to its exercise of jurisdiction

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[2] *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), established that if there are unsettled questions of state law in a federal case that make it unnecessary to decide a federal constitutional question, the federal court should abstain until the state court has resolved the state questions.

The *Pullman* abstention doctrine reflects the desirability of avoiding unnecessary decisions on constitutional issues. *See generally*, 17A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4241 (1988) (hereinafter "– Wright –").

over Ivy "fully comported with administrative due process". *Frank v. Ivy Club*, 120 N.J. 73, 105-111, 576 A.2d 241, 254, 257-261 (1990), *cert. denied sub nom., Tiger Inn v. Frank*, ___ U.S. ___, 111 S.Ct. 799, 112 L.Ed.2d 860 (1991).

Ivy then moved the district court to reopen Ivy's stayed § 1983 action. The district court granted Ivy's motion, finding Ivy had preserved its *England* rights with respect to its § 1983 claims because *England's* overriding concern is that "Federal Constitutional rights be fully litigated." App. 146. Nevertheless, the district court expressed "some hesitation" with its decision, App. 147, and so it certified this question for appeal under 28 U.S.C. 1292(b):

> Whether, on the record before the court, there was a waiver by The Ivy Club of its rights under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 [84 S.Ct. 461, 11 L.Ed.2d 440] (1964), it appearing that The Ivy Club's federal constitutional rights were asserted as defenses and decided in administrative proceedings before the New Jersey Division on Civil Rights, but were expressly reserved from assertion by The Ivy Club in subsequent proceedings on the merits before the Appellate Division and the Supreme Court of New Jersey.

App. 154-55.

On appeal of that order, appellants challenge the decision to reopen Ivy's case. They assert Ivy is barred from litigating its federal constitutional claims in the district court because Ivy failed to reserve its *England* rights in the state proceedings and, therefore, Ivy's § 1983

counts are barred by issue preclusion,[3] New Jersey's entire controversy doctrine, and the federal *Rooker-Feldman* doctrine.[4] Ivy responds that it did not waive its *England* rights prior to the *Pullman* abstention, that at all times subsequent to the abstention it properly reserved its § 1983 claims – and, accordingly, dismissal of its federal action is not warranted.

II.

Implied and Express England Reservations

In *England v. Louisiana State Bd. of Med. Exam.*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), the Supreme Court addressed how a federal litigant, subjected to *Pullman* abstention after properly invoking the jurisdiction of a federal district court, may return to the federal court for a trial of his federal constitutional claims. *England* offers a litigant, who is "compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims" following *Pullman* abstention, *id.*, 375 U.S. at 415, 84 S.Ct. at 464, an *opportunity* to avoid the preclusive effects of the adverse state

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[3] I do not discuss issue preclusion below, because I conclude Ivy's three counts must be dismissed by operation of the *Rooker-Feldman* and New Jersey entire controversy doctrines alone.

[4] Alternatively, appellants contend that Ivy's § 1983 action should be dismissed now because the district court erred by not dismissing it in 1986 under the *Younger* abstention doctrine. I do not believe the *Younger* issue should be reached, and given my view of the case, reversal does not require it.

determination, even one directly rejecting its stayed federal claims. The opportunity depends on timely reservation, i.e., timely objective assertion of *England* rights during the course of state proceedings.

If an *England* reservation is properly made, the litigant who makes it may return to federal district court for a trial *de novo* of his reserved federal questions. *Id.*, 375 U.S. at 416, 84 S.Ct. at 465. Furthermore, the state court should not decide the reserved federal claims. Even if it does, the federal courts will not give preclusive effect to the state decisions on the federal questions when the district court reopens the federal action stayed under *Pullman*. *See* Wright § 4243.

Not all preclusive effects of adverse state decisions are avoided by *England* reservations. State court resolution of the state law question that triggered a *Pullman* abstention "must be given some preclusive effect; otherwise abstention would be a meaningless procedure." *Kovats v. Rutgers*, 749 F.2d 1041, 1046 (3d Cir. 1984).

Reservation of *England* rights must be timely and may be express or implied. The Supreme Court described an express reservation as follows:

> [A] party may readily forestall any conclusion that he has elected not to return to the District Court. He may accomplish this by making on the state record the "reservation to the disposition of the entire case by the state courts". . . . That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with [*Government & Civic Employees Organizing Committee, C.I.O. v. Windsor*, 353 U.S. 364, 77 S.Ct. 838, 1 L.Ed.2d 894 (1957)], and that he intends, should the state

> courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions.

375 U.S. at 421, 84 S.Ct. at 468.[5] As *England* said, *Windsor* requires a reserving party to "inform" the state court of his federal claims without freely and unreservedly litigating them. *England*, 375 U.S. at 420, 84 S.Ct. at 467.

In summary, then, an *express England* reservation has three elements: (1) explicit expression to the state tribunal of an intent to return to federal court in the wake of an adverse state determination, if any; (2) explicit notification to the state tribunal of the federal questions that would be reserved[6]; and (3) an absence of voluntary litigation by the reserving party of the federal questions that would be preserved for federal trial.

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[5] This court has characterized an express reservation as follows:

> [A] party . . . subjected to abstention may reserve his federal claims for federal adjudication by informing the state court of the nature of his federal claims, that he does not wish to litigate those claims in state court, "and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions."

Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1071 (3d Cir. 1990), quoting *England*, 375 U.S. at 421, 84 S.Ct. at 467. *Bradley* did not, however, decide "the general parameters of an *England* reservation." *Bradley*, 913 F.2d at 1072.

[6] Such notification permits the state tribunals to consider the federal questions when deciding the state law issues in dispute. *England*, 375 U.S. at 420, 84 S.Ct. at 467.

Implied reservations also work to guarantee *England* rights to return to district court for a trial *de novo* on federal constitutional questions. *England*, 375 U.S. at 421, 84 S.Ct. at 468 ("an explicit reservation is not indispensable"). Although an implied reservation does not require an explicit expression of intent to return to federal court, it is not effective if "it clearly appears that [the reserving party] voluntarily did more than Windsor required and fully litigated his federal claims in the state courts." *Id.* "[I]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forgo his right to return to the District Court." *Id.*, 375 U.S. at 419, 84 S.Ct. at 467. *See also Bradley*, 913 F.2d 1064, 1073; 18 Wright § 4471, p. 712 (1981) ("Even absent an explicit reservation, any party may return the federal claims to federal court unless he voluntarily does more than required in exposing his federal arguments to the state court.").

Thus, an express or implied reservation is not effective if before it is made, the party has "freely and unreservedly" litigated his constitutional issue and the state tribunal has decided it. Also, a valid reservation, express or implied, requires that the state tribunal be notified of the nature of the federal constitutional issues that are reserved. If an effective *England* reservation of federal constitutional issues is made, the federal district court which has abstained under *Pullman* must decide the reserving party's federal questions after the state court has acted. *England*, 375 U.S. at 421, 84 S.Ct. at 468.

III.

The threshold issue is whether Ivy properly reserved any of its § 1983 claims for federal trial *de novo*. The timing and character of Ivy's conduct during the state proceedings should determine whether Ivy made or waived any express or implied *England* reservations. Accordingly, the parties' litigation must be described in some detail.[7]

Sally Frank was a student of Princeton University in February 1979 when she filed her first complaint with the Division against Princeton and three male-only eating clubs associated with Princeton, including Ivy. Frank alleged that these entities had discriminated against her on the basis of her gender in violation of the LAD. The Division refused to process that complaint.

In November of 1979 Frank filed a second complaint alleging discrimination and that the eating clubs were "public accommodations" subject to the LAD. This second complaint was summarily dismissed by the Division on December 9, 1981 for lack of jurisdiction because the Division considered the Princeton eating clubs to be distinctly private entities outside the reach of the LAD, and because the Division found no probable cause to support the allegations against Princeton. *See Frank v. Ivy Club*, 228 N.J.Super. 40, 548 A.2d 1142, 1145 (1988) (describing

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[7] The majority has indicated that certain procedural events of the state proceedings are not relevant here. Maj. Op., at 274. I believe Ivy's conduct during the adversarial proceedings leading up to the Division's final jurisdictional determination of February 6, 1986 is most relevant to the question of whether Ivy waived its *England* rights.

procedural history of Frank's case), *rev'd, Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 (1990). Before this dismissal, Ivy asserted as a defense, among others, its members' rights to freedom of association under the First Amendment. *Id.* Frank appealed the dismissal to the New Jersey Superior Court.

When opposing Frank's appeal of the Division's dismissal of her second complaint, Ivy again raised and fully briefed the freedom of association issue. *See* App. 7-9. On August 1, 1983, the Superior Court reversed and remanded without reaching the merits of either the Division's dismissal of Frank's complaint or Ivy's First Amendment defense, on the grounds that the Division had dismissed without holding a hearing, and without making findings of fact. *See Frank v. Ivy Club*, 548 A.2d at 1145.

When the Division reconsidered Frank's (now amended) complaint on remand, Ivy again asserted its freedom of association defense against the Division's exercise of jurisdiction. This is clear given the language of the Division's May 14, 1985 Finding of Probable Cause, App. 16-67, and other portions of the record on appeal.[8] *See, e.g.*, App. 10-14 (Brief of Respondents Ivy Club and The University Cottage Club, stamped "received" on

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[8] The parties have provided this court with only snippets of papers filed by Ivy in the state proceedings. Nevertheless, the record demonstrates sufficiently that Ivy fully briefed its First Amendment freedom of association argument to the Division, both before the Division's initial May 14, 1985 Finding of Probable Cause on jurisdiction, and then again, before the Division made its final jurisdictional determination on February 6, 1986.

December 2, 1985 by New Jersey's Office of Administrative Law).

After conducting extensive fact-finding and holding two adversarial fact-finding conferences, fully judicial in nature,[9] the Division issued its Finding of Probable Cause. The Finding addressed two issues: probable discrimination and jurisdiction under the LAD.

Concerning jurisdiction, the Finding concluded on undisputed facts that the defendant eating clubs including Ivy were related integrally to Princeton University, and therefore, were not "distinctly private" associations exempt from the Divisions' jurisdiction under the LAD.[10] With respect to Ivy's First Amendment defense, the Division's Finding of Probable Cause said:

> [The eating clubs] assert that if the L.A.D. is interpreted as reaching the Clubs, the members' constitutional rights of privacy and freedom of association would be violated. The Clubs claim an affirmative right to discriminate based on their members [sic] associational preference. After careful consideration, *the Division finds that applying the L.A.D. to Respondent Clubs would not violate any constitutional rights of association.*

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[9] At these conferences all parties were represented by counsel and were offered the opportunity to make statements, to call and cross-examine witnesses whose testimony could be supplemented and/or corrected by affidavits, to introduce documentary evidence supporting their contentions, and to make extensive legal arguments through briefs, reply briefs and letter memoranda. *See* App. 68-81.

[10] *See N.J.S.A.* 10:5-5(*l*).

App. 60 (emphasis added). Then, after several pages of analysis of the "conflict between associational rights and anti-discrimination legislation . . . recently examined by the Supreme Court in *Roberts v. United States Jaycees*, [468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984)]", App. 60-65, the Division expressly rejected the clubs' freedom of association defense again by saying, "free association rights would not be violated by the assertion of jurisdiction over these 'private clubs' that are integrally connected with Princeton University." App. 65 (emphasis added).

Thus, the jurisdictional portion[11] of the Finding of Probable Cause indicates clearly that before the Division asserted probable jurisdiction, Ivy voluntarily litigated the same freedom of association issue it now seeks to relitigate in federal court. The Finding of Probable Cause shows also that the Division explicitly rejected Ivy's freedom of association defense.

After the Finding of Probable Cause, Ivy and the University Cottage Club continued to assert freedom of association arguments directed at the jurisdictional issue. During adversarial proceedings leading to the Division's final jurisdictional decision,[12] Ivy and the Cottage Club

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[11] The "discrimination" portion of the Finding concluded on certain undisputed facts that probable cause existed to believe the eating clubs and Princeton violated the LAD "by discriminating against women in places of public accommodation and by aiding and abetting such discrimination." App. 67

[12] These adversarial proceedings were first conducted by an administrative law judge ("ALJ") in New Jersey's Office of Administrative Law ("OAL"), which took jurisdiction of the

(Continued on following page)

devoted at least ten pages of two joint briefs to the Division to the freedom of association issue. *See App.* 10-15.

Nevertheless, on February 6, 1986, the Division determined finally that it could exercise LAD jurisdiction over Ivy and the other eating clubs despite their freedom of association arguments. App. 68-81. The Division's final jurisdictional order rejected Ivy's freedom of association defense by adopting the Finding of Probable Cause's prior rejection of the defense. *See* App. 74 (February 16, 1986 final jurisdictional order expressly incorporates "the undisputed facts, *conclusions and legal reasoning* as set forth in the jurisdictional section of the Finding of Probable Cause") (emphasis added); App. 80-81 (same order, wherein "Director rejects respondents' exceptions and affirms the finding and determination as rendered in the Jurisdictional section of the Finding of Probable Cause and the Initial Decision in this matter."); *see also* note 15, herein.

(Continued from previous page)

case after Frank requested it be transferred to the OAL as a contested case pursuant to *N.J.S.A.*. 10:5-13 and *N.J.A.C.* 13:4-12.1(c) and (d).

On December 12, 1985, in response to Frank's motion for summary decision on the issue of jurisdiction, the ALJ found that there were no material facts in dispute with respect to the jurisdictional question, and that the Director's initial May 14, 1985 finding of jurisdiction should be considered final. This recommendation of the ALJ was thereafter adopted by the Director's February 16, 1986 Order of Partial Summary Decision on Jurisdiction. *See Frank v. Ivy Club*, 548 A.2d at 1146.

On February 13, 1986, that is *after* the Division finally asserted LAD jurisdiction and rejected Ivy's freedom of association defense, Ivy filed its § 1983 action in federal court. Count One alleged that the Division's exercise of jurisdiction violated Ivy's constitutional right to freedom of association, the same argument the Division rejected when it exercised jurisdiction under the LAD. Counts Two and Three alleged the Division's exercise of jurisdiction was unconstitutional on two grounds never raised before the Division: the Division's determination of jurisdiction violated Ivy's federal right to procedural due process, and the LAD was unconstitutionally void for vagueness.

Given the pendency of the Division's proceedings against Ivy, the district court stayed Ivy's § 1983 action by abstaining under *Pullman* on June 9, 1986. Also, the district court ordered that the stay "not be interpreted as a ruling that plaintiffs have properly reserved their federal constitutional claims for federal court adjudication." App. 94.

Then, on July 28, 1986, the Division issued its final order that Ivy was liable for discrimination under the LAD.[13] Only later, on July 29, 1986, at the start of administrative hearings before an ALJ on the issue of

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[13] After the ALJ's jurisdictional ruling of December 12, 1985, *see* note 12 herein, Frank filed a Motion for Summary Decision against Ivy on the issue of liability. On June 16, 1986, the ALJ granted Frank's motion. The Director's July 28, 1986 liability decision adopted the ALJ's summary decision on Ivy's liability under the LAD, and remanded the case back to the OAL for further proceedings on remedies to be afforded Frank. *See Frank v. Ivy Club*, 548 A.2d at 1147.

damages and remedies, did Ivy first expressly indicate on the record of the state proceedings that it intended to reserve *England* rights.[14]

Nearly a year later, on May 26, 1987, the Division issued its final decision in Frank's case. This order adopted in part and modified in part the ALJ's recommendation of appropriate remedies. App. 99-115. It also reaffirmed the Division's earlier rejection of Ivy's freedom of association defense against the Division's exercise of jurisdiction under the LAD.[15]

After this last agency order in the *Frank* case, Ivy appealed the Division's adverse decisions to the New

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[14] At the July 29, 1986 OAL hearing on damages and remedies before an ALJ, counsel for Ivy said, orally (App. 134):

> At this point, we also seek to preserve our federal claim for consideration by federal court and we specifically reserve them under the England Reservation Doctrine, though we may change in our decision of this matter. At this point, Ivy will not be arguing any federal issues.

[15] The Director reaffirmed the prior rejection of Ivy's freedom of association argument by saying (App. 107):

> The ALJ's discussion on the First Amendment rights of the clubs is also rejected as inconsistent with the jurisdictional finding. In the Finding of Probable Cause . . . which was incorporated in my February 6, 1986 ruling [on jurisdiction] . . . I specifically addressed the clubs' First Amendment claims of freedom of association rights and found that any rights that they may have to freely associate did not include a right to discriminate on the basis of sex. The ALJ's reliance on free association rights is therefore misplaced. My February 6, 1986 ruling is hereby reaffirmed.

Jersey Superior Court. Ivy's appeal purported to make an *England* reservation of Ivy's federal constitutional claims. App. 133.

On October 4, 1988, the Superior Court reversed the Division's decisions on jurisdiction and liability, holding that the Chief of the Enforcement Bureau of the Division had erred during the initial fact-finding conference leading up to the Division's initial Finding of Probable Cause. The Superior Court said the Chief erred by exceeding his authority by resolving disputed facts; and that the Division, by relying on the facts as resolved by the Chief, had abused its discretion. *Frank v. Ivy Club*, 548 A.2d at 1153-54.

Sally Frank then appealed the Superior Court's reversal of the Division's final jurisdictional and liability decisions to the New Jersey Supreme Court. Although Ivy submitted no new briefs to the state supreme court, Ivy's appellate brief for the Superior Court, which contained a purported *England* reservation, was forwarded to the state supreme court.

Frank prevailed before the New Jersey Supreme Court. It reversed the Superior Court and affirmed the Division's final decisions on jurisdiction and liability. Although the supreme court did not rule directly on the merits of Ivy's constitutional defense against the Division's exercise of jurisdiction, it took note that the Division had expressly rejected Ivy's "constitutional free-association" argument when making the Finding of Probable Cause. *See Frank v. Ivy Club*, 576 A.2d at 251. The supreme court found that the Division's handling of Ivy's

case and the Superior Court's two reviews of it constituted a "procedure [which] accorded the parties their administrative due process rights". *Id.* at 244.

After the New Jersey Supreme Court affirmed the Division's adjudication, Ivy moved the district court to reopen the stayed § 1983 action, and the district court did. The court also certified the *England* question for defendants' interlocutory appeal.

IV.

Ivy's Waiver of England Rights

I would hold that Ivy reserved none of its § 1983 claims for trial in federal district court.

A. *Freedom of Association Claim*

Ivy waived *England* rights with respect to its freedom of association claim (Count One) by *freely and unreservedly litigating* that issue before the Division's final jurisdictional determination on February 6, 1986. In *England*, the Supreme Court declared clearly,

> We now explicitly hold that if a party *freely and without reservation* submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then – whether or not he seeks direct review of the state decision in this Court – he has elected to forgo his right to return to the District Court.

375 U.S. at 319, 84 S.Ct. at 467 (emphasis added).

The record on appeal shows Ivy voluntarily litigated the merits of its freedom of association defense against

the Division's exercise of jurisdiction without asserting any *England* reservation before the Division's final February 6, 1986 jurisdictional decision. Indeed, Ivy unreservedly litigated its freedom of association defense from the earliest state proceedings through the Division's final rejection of Ivy's position: Ivy raised the defense when Frank filed her 1979 complaint; Ivy briefed the issue when opposing Frank's 1982 appeal to the New Jersey Superior Court; Ivy advanced the freedom of association defense before the Division made its Finding of Probable Cause, which expressly rejected Ivy's argument; and Ivy continued to litigate the same defense during the fully adversarial proceedings which resulted in the Division's February 6, 1986 final order on jurisdiction, which rejected Ivy's constitutional argument. All this occurred before Ivy did anything arguably constituting an express or implied *England* reservation.

In sum, Ivy unreservedly litigated the freedom of association issue and had it decided by a state tribunal before making any *England* reservation.[16] This constitutes a waiver of *England* rights with respect to Count One of Ivy's § 1983 action. There is no evidence Ivy was compelled to litigate the freedom of association issue unreservedly and as fully as it did.

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[16] Ivy made its first oral reservation of *England* rights on July 29, 1986, at the start of administrative proceedings on damages and remedies, App. 134; and Ivy made its first written reservation later, on October 5, 1987, when Ivy filed its appeal from all of the Division's adverse orders with the Superior Court of New Jersey. App. 133.

If state litigants could successfully assert express or implied *England* reservations *after* they freely and voluntarily litigated their federal constitutional allegations *and* state tribunals rejected them, then litigants would be free to test their federal claims in state proceedings, and if unsuccessful there, get a second chance in § 1983 actions in federal district courts. Such an expansive interpretation of *England* would controvert the full faith and credit federal courts must give to state decisions reviewed by state courts, and result in repetitive, vexatious litigation.

Even if filing a federal action might by itself in some circumstances qualify as an implied *England* reservation, Ivy's § 1983 complaint was filed too late to be an implied reservation. Ivy's federal action, like its belated express attempts to reserve, followed Ivy's own efforts to litigate the First Amendment issue, *and* the Division's final jurisdictional order rejecting Ivy's First Amendment defense. *England* reservations should precede the state decisions on federal questions that would be avoided.

That Ivy's belated attempts to reserve followed a final state *agency* determination of jurisdiction rather than a state *court* decision on the issue should not help Ivy's case. The essential elements and timing of valid *England* reservations should not differ depending on whether the state decision to be avoided originated with an administrative tribunal and was subjected to higher state court review[17] – or, rather, with a fully judicial state court.

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[17] The Division's determinations were subject to state court review, state courts reviewed the Division's determinations in the *Frank* case on more than one occasion, and pursuant to Ivy's appeal from the Division's adverse jurisdictional determination, the New Jersey Supreme Court affirmed.

B. *Procedural Due Process and Void for Vagueness Claims*

Like Ivy's First Amendment claim, its procedural due process and void for vagueness arguments (Counts Two and Three, respectively) were not properly reserved by Ivy. Although Ivy did not unreservedly litigate these two issues in the state proceedings, Ivy also did not inform the Division of them before the Division decided the relevant jurisdictional question. Thus, Ivy failed to do what *Windsor* requires as a prerequisite of reservation: Ivy did not give the state tribunal an opportunity to decide the state law jurisdictional question in light of Ivy's federal due process and void for vagueness arguments.

Under *England*, it is not enough to simply refrain from litigating in state proceedings the federal constitutional questions that would be reserved for a subsequent federal trial. An effective *England* reservation requires that a reserving litigant notify the state tribunal of the federal questions. *Bernardsville Quarry v. Borough of Bernardsville*, 929 F.2d 927, 929 (3d Cir.1991), *petition for cert. filed*, 60 U.S.L.W. 3057 (U.S. June 3, 1991) (No. 91-111).

Ivy never informed the state administrative tribunals of its procedural due process and void for vagueness arguments. Ivy cannot now assert successfully that it reserved these claims, even if it did refrain from litigating them during the course of the state proceedings.

In conclusion, Ivy failed to make an effective *England* reservation in this case. Accordingly, each of its federal claims must be exposed to legal doctrines which require the district court to dismiss Ivy's complaint.

V.

Absent Effective England Reservations, Each of Ivy's § 1983 Claims Must Be Dismissed

Although the district court only certified the question of whether Ivy properly reserved its § 1983 claims under *England*, the undisputed facts of this case permit this court to conclude Ivy's unreserved claims must be dismissed on several grounds. The *Rooker-Feldman* jurisdictional doctrine divests the district court of subject matter jurisdiction over Counts One and Two. New Jersey's entire controversy doctrine requires dismissal of Count Three.

A. *Under Rooker-Feldman, the District Court Does Not Have Subject Matter Jurisdiction to Hear Counts One and Two.*

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), the Supreme Court established a jurisdictional rule which bars lower federal courts from reviewing state court judgments. The doctrine has much the same effect as claim and issue preclusion. *See* 18 Wright § 4469.

The Supreme Court reinvigorated the doctrine in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). *Feldman* reiterated *Rooker's* rule that a federal district court is without authority to review final determinations of state or local courts because such review can only be conducted by the Supreme Court pursuant to 28 U.S.C. § 1257. *Id.*, 460 U.S. at 476, 103 S.Ct. at 1311 (citing *Rooker*). *Feldman* also held that, to the extent federal plaintiffs effectively seek

review of the constitutionality of a state or local court's *judicial* (rather than administrative or legislative) actions, a district court has no jurisdiction.

> [District courts] do not have jurisdiction . . . over challenges to state-court decision in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in [the United States Supreme Court].

Id., 460 U.S. at 486, 103 S.Ct. at 1317. Nevertheless, to the extent federal plaintiffs seek *generally* to challenge the federal constitutionality of a local or state statute or judicially promulgated rule, *Feldman* held a district court *does* have jurisdiction to hear plaintiffs' claims. *Id.*, 460 U.S. at 482-86, 103 S.Ct. at 1315-17.

Rooker-Feldman, then, stands for the following two propositions relevant to this appeal: (1) to the extent Ivy seeks district court review of the constitutionality of New Jersey judicial acts determining Ivy's rights in the *Frank* case, the district court has *no* jurisdiction; and, (2) to the extent Ivy mounts a *general* challenge to the constitutionality of the LAD, the district court *has* jurisdiction to hear that claim.

Applied here, *Rooker-Feldman* bars the district court from asserting subject matter jurisdiction over Counts One and Two of Ivy's complaint, that is, Ivy's freedom of association and procedural due process claims. These § 1983 counts attempt to nullify the New Jersey Supreme Court's affirmation of the Division's actual assertion of jurisdiction over Ivy in the Frank case. If Ivy were to litigate these counts in district court, the district court

would be effectively reviewing the state supreme court's judicial determination that the Division properly exercised jurisdiction over Ivy. *Rooker-Feldman's* jurisdictional rule precludes this.[18] Only the United States Supreme Court may review the New Jersey Supreme Court's final judgment in the *Frank* case.[19]

Rooker-Feldman does not, however, bar the district court's exercise of jurisdiction over the general constitutional challenge to the LAD represented by Count Three of Ivy's § 1983 action.[20] This general challenge does not allege the unconstitutionality of a specific state "judicial act", which allegation *Rooker-Feldman* would not permit the district court to hear. No New Jersey tribunal, quasi-judicial or fully judicial in nature, ever reached the question of whether the LAD is unconstitutionally vague

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[18] *Rooker-Feldman's* jurisdictional bar operates only to the extent Ivy did *not* make a valid *England* reservation of its first two counts. If Ivy made valid reservations of these counts, then the district court would have jurisdiction to hear these claims irrespective of *Rooker-Feldman* doctrine. *Rooker-Feldman* should not destroy a district court's jurisdiction over properly reserved federal constitutional questions, even when state courts previously have decided those issues. Otherwise, *Rooker-Feldman* would defeat *England's* utility where federal plaintiffs subjected to *Pullman* abstention are compelled involuntarily to have their federal constitutional claims decided by state courts.

[19] Ivy has declined to seek federal Supreme Court review of the state supreme court decision.

[20] To the extent Count Three may also be read as a constitutional challenge to the Division's particular exercise of jurisdiction over Ivy in the *Frank* case, the district court is without jurisdiction.

under the Fifth and Fourteenth Amendments, as Ivy alleges it is.

B. *New Jersey's Entire Controversy Doctrine Compels the District Court to Dismiss Count Three*

New Jersey's entire controversy doctrine would bar New Jersey courts from hearing any of Ivy's § 1983 claims which it could have, but did not, raise in the first instance in the New Jersey proceedings. The doctrine, now codified at N.J.R.Civ.P. 4:30A,[21] requires that "a party who has elected to hold back from the first proceeding a related component of the controversy be barred from thereafter raising it in a subsequent proceeding." *Woodward-Clyde v. Chem. & P. Sciences*, 105 N.J. 464, 523 A.2d 131, 135 (1987) (citations omitted). The doctrine "requires that a person assert in one action all related claims against a particular adversary or be precluded from bringing a second action based on the omitted claims against that party." *Melikian v. Corradetti*, 791 F.2d 274, 279 (3d Cir.1986). A party "is precluded from litigating in a subsequent proceeding both claims that it actually litigated and claims that it could have litigated in an earlier proceeding." *Bernardsville Quarry*, 929 F.2d at 930.

"The New Jersey entire controversy doctrine is a particularly strict application of the rule against splitting

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[21] *N.J.R.Civ.P.* 4:30A provides:

> Non-joinder of claims or parties required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine.

a cause of action. Like all versions of that rule its purpose is to increase judicial efficiency." *Bennun v. Rutgers State University, et al.*, 941 F.2d 154, 163 (3d Cir.1991), citing *Bernardsville Quarry*, 929 F.2d at 930. The entire controversy doctrine "ensure[s] that, to the extent possible, disputes are settled in a single litigation." *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 594 (3d Cir.1989).

Under the entire controversy doctrine, all possible claims must be brought in a single action:

> [If] the litigants in the action as framed will, after final judgment therein is entered, be likely to have to engage in additional litigation in order to conclusively dispose of their respective bundles of rights and liabilities which derive from a single transaction or related series of transactions, then the omitted component must be regarded as constituting an element of the minimum mandatory unit of litigation. That result must obtain whether or not the component constitutes either an independent cause of action by technical common law definition or an independent claim which, in the abstract, is separately adjudicable.

Melikian, 791 F.2d at 279-80 (citation omitted); *O'Shea*, 886 F.2d at 590-91 (same).

We must apply this test to Count Three[22] of Ivy's federal action in order to decide whether Ivy's void for

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[22] Ivy's procedural due process claim (Count Two) is also susceptible to defeat by entire controversy doctrine analysis because Ivy did not initially raise that claim in the state proceedings. Nevertheless, I would rest dismissal of Count Two on *Rooker-Feldman* grounds alone.

vagueness argument could have been decisive of Ivy's rights in the *Frank* case. If it could have been, the entire controversy doctrine would bar a New Jersey court from hearing Count Three for the first time now. *See O'Shea*, 886 F.2d at 591; *Bernardsville Quarry*, 929 F.2d at 929.

A New Jersey court confronting Ivy's void for vagueness claim for the first time now would dismiss it under the entire controversy doctrine. A New Jersey court would find that Ivy could have, but did not, raise the void for vagueness challenge to the LAD at the start of the state proceedings; and that the issue might potentially have determined the parties' respective rights and liabilities under the LAD.

Following the Full Faith and Credit Act, 28 U.S.C. § 1738, the district court must do what a state court would. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466, 102 S.Ct. 1883, 1889, 72 L.Ed.2d 262 (1982) (construing 28 U.S.C. § 1738). Since the New Jersey Supreme Court's final judgment has ended the *Frank v. Ivy* litigation, the district court now must apply the entire controversy doctrine, as a New Jersey Court would, to dismiss Ivy's void for vagueness claim, which Ivy never raised at the start of the state proceedings.

VI.

The majority concludes on "a balancing of the equities" that "a sense of basic fairness dictates that Ivy be permitted to litigate its federal claims in the federal forum", Maj.Op. at 282-83; and that "Ivy, in the unique

circumstances of this case, sufficiently reserved its right to litigate its federal claims in federal court." *Id.* at 273. The circumstances here do not warrant the majority's balancing approach to the issue of whether Ivy made effective *England* reservations.

Ivy's *England* rights should turn on Ivy's conduct during the state proceedings, not on some vague notion that "basic fairness dictates" Ivy's § 1983 action should be reopened. The "equities" and "basic fairness" approach taken by the majority does not advance analysis of this case, is without precedent, and will only confuse later litigants as to *what* they must do, and *when* they must do it, in order to preserve *England* rights.

The majority also confuses *England* analysis, which here should be primarily an inquiry into Ivy's litigation conduct, when it says the district court's *Pullman* abstention "deprived Ivy of a full and fair opportunity to litigate its federal claims", *id.* at 283; and that the district court "repeatedly put Ivy in a 'catch-22' situation by not deciding the reservation issue at [the time of abstention]". *Id.* at 281. The majority implies that a district court must decide the validity of a party's *England* reservation when the court first abstains under *Pullman*. I find no support for that proposition.

The validity of an *England* reservation can only be determined by a district court when a party seeks to *reopen* stayed federal claims at the conclusion of state proceedings. A party's actions in state proceedings following *Pullman* abstention may ultimately defeat its *England* rights, as when the party fails (like Ivy did) to notify state tribunals of federal issues that would be reserved.

Thus, the district court's refusal to rule on the *England* question when it abstained is not dispositive of whether Ivy properly reserved. Ivy's tardiness going to district court and asserting *England* rights *after* suffering an adverse jurisdictional determination is the cause of the *England* problem in this case.

That "defendants failed to raise any objection to Ivy's *England* reservations in the state court", Maj.Op. at 282, is perhaps the majority's strongest reason for finding Ivy did not waive its *England* rights. The majority relies on our opinion in *Bradley*, 913 F.2d 1064, where we found an effective *England* reservation, *in part* because of a failure to object to it. However, even as the majority admits, *Bradley* is distinguishable on several grounds. Most important is that the reserving party in *Bradley* filed his federal action *before* entering the state proceedings, and he made his *England* intentions clear to the state tribunals in a timely fashion.

Ivy did nothing constituting objective evidence of an intent to return to federal court until *after* it suffered the Division's final adverse jurisdictional determination. Ivy did not file an action in federal court before the Division's final decision, and Ivy expressly asserted *England* only after being confronted with an adverse determination on liability. Thus, *Bradley* is not on point. Ivy's purported *England* reservations should be viewed as ineffective despite appellants' failure to object to the purported reservations during the state proceedings.

I would hold that if a party waives its *England* rights by making belated reservations, those defective reservations should not accomplish what timely reservations

would have – avoidance of the preclusive effects of prior state adjudications – even if the late reservations caused state appellate courts to "acquiesce" to the untimely reservations. That the New Jersey appellate courts "appear to have acquiesced to Ivy's reservation", Maj.Op. at 281, should not be the measure of whether Ivy asserted *England* in time. Indeed, those courts could *not* consider Ivy's procedural due process and void for vagueness arguments when reviewing the Division's final jurisdictional order, because Ivy did not raise those questions until *after* the order was issued.

Also, the untimeliness of Ivy's purported reservations should not be cured just because Ivy "refrained from litigating its federal constitutional claims" after the district court's decision to abstain, and thereafter "expressly stated its wishes to preserve its right to litigate in federal court". *Id.* at 281. Only objectively ascertainable attempts to reserve made *before* a decision on the merits that would be avoided should be effective, even if that decision originated with a quasi-judicial tribunal.

VII.

I do not agree that Ivy "detrimentally relied" on the district court's "judicial grant of jurisdiction" over Ivy's § 1983 action, Maj.Op. at 283, and on the court's decision to stay. *Id.* at 282. The majority relies on such findings of "detrimental reliance" to justify both the conclusion that Ivy lacked a "full and fair opportunity to litigate its federal claims in the state court", and also the "balancing of the equities" approach taken to decide the case. *See id.* at 282, 283.

The record shows, however, that Ivy did not detrimentally rely on the district court's actions. The district court's stay order *explicitly warned* Ivy that the *Pullman* stay should "not be interpreted as a ruling that plaintiffs have properly reserved their federal constitutional claims for federal court adjudication." App. 94.

So, if there was no detrimental reliance, then the district court's jurisdiction over Ivy's action (and the staying of it) did not destroy Ivy's full and fair *opportunity* to either litigate its constitutional questions *or* reserve them under *England* before the Division's final jurisdictional determination (which preceded any district court actions). It follows that, in the wake of the New Jersey Supreme Court decision in the *Frank* case, state law doctrines of finality and New Jersey's entire controversy doctrine (which the majority ignores) should work a preclusive effect on Count Three of Ivy's action. Furthermore, to the extent Ivy did not "detrimentally rely" on the district court, the majority's resort to equitable analysis is misplaced.

VIII.

Assuming arguendo that the majority is correct that Ivy has effectively reserved *England* rights in the circumstances of this case, its conclusion that Ivy will be bound in the district court by some of the state findings of fact is wrong. *See* Maj.Op. at 284. After making an effective *England* reservation, a litigant "may not be unwillingly deprived" of district court determination of the facts in his case. *England*, 375 U.S. at 417, 84 S.Ct. at 465. Indeed, once a valid reservation is made, even United States

Supreme Court review of a state court decision would be an "inadequate substitute" for a determination in the first instance by a district court of all factual issues material to Ivy's claims, state findings of fact notwithstanding. *Id.* 375 U.S. at 416, 84 S.Ct. at 465.

In conclusion, I respectfully dissent and would reverse the district court and remand for dismissal of Ivy's § 1983 action.

APPENDIX B

Order of the United States Court of Appeals for the Third Circuit Granting Leave to Appeal under 28 U.S.C. § 1292(b)

(Filed December 3, 1990)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Misc. No. 90-8105

The Ivy Club, etc.
vs.
Robert J. Del Tufo, etc., et al.,
Petitioners (Related to Trenton, NJ D.C. Civil No. 86-0609) (JCL)

November 7, 1990
#C-39

Present: SLOVITER and SCIRICA, Circuit Judges.

Petition by Petitioners under 28 U.S.C. § 1292(b) for leave to appeal interlocutory order,

/s/ Debra Ruh
Deputy Clerk 7-5019

ORDER

The foregoing petition by petitioners for leave to appeal is granted.

A TRUE COPY:

/s/ Frances R. Matysik
FRANCES R. MATYSIK,
Deputy Clerk

AG/cc: J.C.B.
B.S.N.
S.F.
N.T.
A.H.B.
Hon. J.C.L.
Dated: DEC - 3 1990

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

APPENDIX C

Order of the United States District Court for the District of New Jersey

(Filed October 16, 1990)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO:
86-0609 (JCL)

THE IVY CLUB,

Plaintiff,

v.

W. CARY EDWARDS, ET AL.,

Defendants,

This matter having been brought before the United States District Court for the District of New Jersey by Barbara S. Nelson, Esquire of McCarthy and Schatzman, P.A., attorneys for plaintiff, The Ivy Club, on Notice of Motion, for an order to reopen the within case, to determine if it is properly before the Court and to amend pleadings to include defendants' successors in office, and by Jeffrey Burstein, Esquire, Deputy Attorney General, attorney for defendants, on Notice of Cross-Motion for Dismissal, and the court having considered the papers submitted by all parties and having heard oral argument, for good cause shown;

IT IS on this 15th day of October, 1990, **ORDERED** that:

1. The within case is hereby reopened and reinstated on the docket.

2. This matter is now properly before this court to consider the federal claims filed by Plaintiff, The Ivy Club, as a result of the court's abstention under *Pullman* and plaintiff's reservation of its federal claims under *England*.

3. Defendants' Cross-Motion to dismiss is hereby denied.

4. The pleadings are hereby amended to include defendants' successors in office.

5. For purposes of 28 U.S.C. § 1292(b), the within order involves a controlling question of law as to which there is substantial ground for difference of opinion and as to which an immediate appeal may materially advance the ultimate termination of the litigation. That question is:

> Whether, on the record before the court, there was a waiver by The Ivy Club of its rights under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), it appearing that The Ivy Club's federal constitutional rights were asserted as defenses and decided in administrative proceedings before the New Jersey Division on Civil Rights, but were expressly reserved from assertion by The Ivy Club in subsequent proceedings on the merits before the Appellate Division and the Supreme Court of New Jersey.

/s/ John C. Lifland
JOHN C. LIFLAND
United States
District Judge

APPENDIX D

1986 Decision of the United States District Court for the District of New Jersey

(Filed – June 9, 1986)

United States District Court,
D. New Jersey
Civ. No. 86-609

The TIGER INN, a New Jersey Corporation, Plaintiff,

v.

W. Cary EDWARDS, Attorney General of New Jersey, and Pamela Poff, Director, New Jersey Department of Law & Public Safety, Division on Civil Rights, Defendants.

The IVY CLUB, a New Jersey Corporation, Plaintiff,

W. Cary EDWARDS, Attorney General of New Jersey, and Pamela Poff, Director, New Jersey Department of Law & Public Safety, Division on Civil Rights, Defendants.

June 9, 1986.

Russell Beatie, for plaintiff Tiger Inn.

Barbara Nelson, Princeton, N.J., for plaintiff Ivy Club.

Nancy Kaplan Miller, Deputy Atty. Gen., Newark, N.J., for defendants Edwards and Poff.

COWEN, District Judge:

In December 1979, Sally Frank, then a student at Princeton, filed a verified complaint with the New Jersey

Division on Civil Rights alleging that three eating clubs at Princeton, the Tiger Inn, the Ivy Club, and the University Cottage Club, violated the New Jersey Law against Discrimination by admitting only male Princeton students. In December 1981, the Division dismissed the complaint, finding that it had no jurisdiction over the clubs because they were "in their nature distinctly private." *See* N.J.S.A. 10:5-5(*l*). In August 1983, the Appellate Division, while taking no position on the merits, vacated the Division's decision and remanded for further fact finding.

The Division conducted further fact finding, and, in May 1985, issued a Finding of Probable Cause, both as to jurisdiction and as to discrimination. Upon the request of Sally Frank, the matter was transferred to the Office of Administrative Law. In December 1985, the ALJ granted partial summary decision (analogous to partial summary judgment) on the jurisdictional issue.

The clubs then obtained a stay of proceedings "pending the completion of all possible means of reviewing the determination that the respondent clubs are subject to" the Law Against Discrimination. *See* Exhibit B, Brief of Ivy Club. In granting the stay, the ALJ noted:

> This decision is based on my belief that the jurisdictional issue is important, if not critical, to the ultimate disposition of the matter and on the representation [*sic*] of Mr. Beatie that he will seek leave to appeal my ruling to the Appellate Division. . . .

See Exhibit D, Brief of Ivy Club.

After the stay was granted, the Director accepted the ALJ's decision. The Tiger Inn and Ivy Club then filed

complaints in this court.[1] They allowed their time seek an interlocutory appeal before the Appellate Division to lapse.

Before this court, the clubs contend that the exercise of jurisdiction by the Division of Civil Rights violates their civil rights under the federal constitution. In particular, they claim that the Law Against Discrimination is void for vagueness; that application of the Law Against Discrimination to them violates their freedom of association; and that the administrative procedures have violated their due process rights. They seek a declaratory judgment and a injunction against the state proceedings. Defendants are Attorney General W. Cary Edwards and Director of Civil Rights Pamela Poff.

Defendants move to dismiss for lack of subject matter jurisdiction. In the alternative, they move for abstention pursuant to *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

SUBJECT MATTER JURISDICTION

Defendants claim that the clubs are attempting to appeal an adverse decision in the state legal system to a federal district court. Since this court's jurisdiction is original, not appellate, they argue that this court lacks jurisdiction.

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[1] Their separate complaints were consolidated on consent. The University Cottage Club settled with Sally Frank by changing its admission policy and by paying $20,000.

It is certainly true that a 42 U.S.C. § 1983 action is not an appropriate vehicle to appeal a state court judgment. *District of Columbia Court Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1982); *Carbonell v. Louisiana Dept. of Health and Human Resources*, 772 F.2d 185 (5th Cir.1985). However, nothing in this doctrine suggests that it applies to decisions made by state administrative agencies in administrative proceedings in addition to judgments rendered by state courts in judicial proceedings. Such an expansion of the doctrine would, in many cases, undermine the well established principle that a plaintiff need not exhaust state remedies before suing under 42 U.S.C. § 1983. See *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1017 (3d Cir.1981).

The court finds that it has subject matter jurisdiction.

YOUNGER ABSTENTION

Defendants argue that dismissal is appropriate under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct.746, 27 L.Ed.2d 669 (1971). In *Younger*, the Supreme Court held that a federal court should ordinarily abstain from enjoining a pending state criminal proceeding. Although the *Younger* doctrine has been expanded well beyond the criminal sphere, the Third Circuit has held that "outside the special context of civil contempt proceedings, the *Younger* doctrine should not be extended to cases in which the state proceedings have not been initiated by the state itself." *Johnson v. Kelly*, 583 F.2d 1242, 1249 (3d Cir.1978); *See also Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission*, 791 F.2d 1111, 1116-17 (3d Cir.1986).

In arguing for *Younger* abstention, defendants rely upon *Williams v. Red Bank Bd. of Ed.*, 662 F.2d 1008 (3d Cir.1981). In *Williams*, the Third Circuit found that a local school board, in bringing disciplinary charges against a teacher, was discharging responsibilities delegated to it by the state. Therefore, the court concluded, abstention was appropriate despite the fact that the state itself had not initiated the action. Defendants contend that just as the state delegated its responsibilities to the local school board in *Williams*, so too the state in this case has simply authorized private individuals to enforce its civil rights laws. They note that, pursuant to the Law Against Discrimination, the state has been monitoring the matter and is prepared to intervene should the plaintiff in the state action fail to protect the public interest. *See* N.J.S.A. 10:5-13.

In addition, defendants argue that the central consideration in an analysis of *Younger* abstention is the strength of the state's interest. They emphasize that New Jersey has made clear that discrimination is a significant matter of public concern because it "menaces the institutions and foundation of a free democratic State." N.J.S.A. 10:5-3.

This case presents a close question and perhaps calls for a small expansion of the *Younger* doctrine. The state does appear to be intimately involved with the state proceeding. Indeed, it is the Attorney General and the Director of the Division on Civil Rights, not Sally Frank, whom the clubs seek to enjoin. Nevertheless, in light of the disposition below, it is unnecessary for the court to decide this issue.

PULLMAN ABSTENTION

Defendants also contend that this court should abstain pursuant to *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Under *Pullman*, the federal court should abstain from deciding a question of federal constitutional law where the challenged state law is unsettled and resolution of the state law claim may make it unnecessary to address the federal constitutional issue. *See generally* Wright, Miller and Cooper, Federal Practice and Procedure, Section 4242.

This case presents a classic situation for *Pullman* abstention. The New Jersey Law Against Discrimination provides an exception for "any institution, bona fide club, or place of accommodation, which is in its nature distinctly private." N.J.S.A. 10:5-5(*l*). It is unclear, as a matter of state law, whether the clubs are "distinctly private." *Cf. Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission*, 791 F.2d at 1116-17 (3d Cir. 1986). Indeed, the Division on Civil Rights initially held that they were. The Appellate Division, in vacating this judgment, voiced no opinion on the applicability of the Law Against Discrimination to the clubs. Instead, it simply remanded for further fact-finding. Moreover, in staying the proceedings pending appeal, the ALJ implied that it was a difficult question of state law. Thus, despite plaintiffs' claims to the contrary, the court finds that the state law is unclear.

Plaintiffs also argue against abstention by emphasizing that First Amendment rights should be vindicated quickly and not subject to the delays which accompany

abstention. This argument ignores that plaintiffs are continuing to operate without admitting women during the pendency of the state litigation. No one is depriving them of their claimed constitutional right to do so.

In addition, plaintiffs contend that they have very little chance of success on appeal to the Appellate Division in light of the scope of review of administrative determinations. However, plaintiffs' apprehension concerning administrative law are ill-founded. The Administrative Law Judge granted summary decision (analogous to summary judgment) and thus found that there was no genuine dispute of material fact. Thus the question to be reviewed regarding the applicability of the Law Against Discrimination is a question of law.[2]

Under New Jersey law, "[a]n appellate tribunal is . . . in no way bound by the agency's interpretation of a statute or its determination of a purely legal issue." *Mayflower Securities v. Bureau of Securities*, 64 N.J. 85, 93, 312 A.2d 497 (1973). Similarly, in *Abbott v. Burke*, 100 N.J. 269, 495 A.2d 376 (1985) the New Jersey Supreme Court held that "although an agency may base its decision on constitutional considerations, such legal determinations do not receive even a presumption of correctness on appellate review." *Id.* at 299, 495 A.2d 376. Particularly where a statute must be interpreted in light of constitutional considerations, there is no reason to believe that a New

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[2] Plaintiffs also claim that the Administrative Law Judge treated as undisputed certain facts that were in dispute. It is difficult to see how, if this is true, the action of the Administrative Law Judge in this regard could be anything but arbitrary and capricious.

Jersey court would defer to an administrative interpretation of that statute rendered in the course of enforcement proceedings. *Cf. Bergen Pines Hospital v. Department of Human Services*, 96 N.J. 456, 476 A.2d 784 (1984) (agency regulation accorded presumption of validity and reasonableness).

It is undisputed that a determination that the New Jersey Law Against Discrimination does not apply to the plaintiffs would obviate the need to adjudicate the constitutional issues raised in this case. Therefore, the court will abstain from exercising its jurisdiction.

The normal course when a court abstains pursuant to *Pullman* is to stay the federal action pending a determination of the state law by the state courts. The plaintiff simply files a complaint and litigates the action in state court.[3] He has the choice of either submitting the federal constitutional issues to the state court or reserving them for the federal court. *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

The defendants in this case contend that the plaintiffs have already submitted their federal constitutional claims to the state administrative law judge as well as to the Appellate Division, thus making it impossible for them to invoke *England* reservation. They contend that a party may not "reserve" the federal forum once they have

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[3] In states which permit it, the state law questioning is directly certified from the federal court to the highest state court. *Bellotti v. Baird*, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976).

submitted federal issues to the state court. Plaintiffs, on the other hand, contend that *England* only blocks return to the federal court after the federal claims are "fully litigated" in the state courts. They argue that they will preserve their federal forum by declining in the future to raise federal constitutional issues in the state litigation.

Defendants appear to have the better of the argument. In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), the Supreme Court noted that *England* only applied "[w]here a plaintiff properly invokes federal-court jurisdicton [sic] in the first instance." *Id.* at 101-02 n. 17, 101 S.Ct. at 418-19 n. 17. *Allen*, however, was not an abstention case. Rather, it held that collateral estoppel barred a 42 U.S.C. § 1983 damage claim regarding the constitutionality of search and seizure where the plaintiff had lost his motion to suppress in his criminal trial. Thus while *Allen* supports defendants' position, it does not necessarily foreclose plaintiffs' position.

Oler v. Trustees of Cal. State University, 80 F.R.D. 319 (N.D. Cal. 1978), a case not cited by the parties, held that a plaintiff who filed an action in state court before filing in federal court could not make an *England* reservation since he had initially sought relief in the state court and had unreservedly raised his federal constitutional claims there. It, too, is distinguishable since plaintiffs in this action did not select the state forum.

The court finds, however, that the question of the appropriateness of *England* reservation is not properly before it at this time. In effect, a ruling on this question would be a ruling on the *res judicata* effect of a state court judgment which has not yet been entered. Therefore, the

court will stay the action until the state proceedings have produce a surer-footed reading of the New Jersey Law Against Discrimination. The above discussion regarding *England* is included in this opinion to ensure that the plaintiffs do not erroneously rely on the stay granted by the court as a determination that they may return to federal court to adjudicate their federal constitutional claims.

In summary, the court finds that it has subject matter jurisdiction over the case, but will stay the action until the New Jersey courts have clarified the application of the New Jersey Law Against Discrimination to the plaintiffs. This determination makes it unnecessary for the court to decide the question of *Younger* abstention. Plaintiffs are cautioned not to interpret the court's decision to grant a stay as a ruling that they have properly reserved their federal constitutional claims for federal court adjudication pursuant to *England*.

The court will enter an appropriate order.

APPENDIX E

Opinion of the Supreme Court of New Jersey

(Filed – July 3, 1990)

Supreme Court of New Jersey

Sally FRANK, Complainant-Appellant

v.

IVY CLUB, Tiger Inn, and Trustees of Princeton University, Respondents-Respondents,

and

University Cottage Club, Respondent

Argued Jan. 30, 1990 – Decided July 3, 1990.

Sally Frank, *pro se*.

Nadine Taub, for complainant-appellant (Nadine Taub, Newark, and Sally Frank, attorneys; Anna May Sheppard, West Orange, of counsel).

Wendy L. Mager, for respondent-respondent Trustees of Princeton University (Smith, Stratton, Wise, Heher & Brennan, Princeton, attorneys).

Susan L. Reisner, Deputy Atty. Gen., for respondent-respondent Div. on Civ. Rights (Robert J. Del Tufo, Atty. Gen., attorney).

Barbara Strapp Nelson, for respondent-respondent Ivy Club (McCarthy and Schatzman, Princeton, attorneys).

Russel H. Beatie, Jr., New York City, a member of the New York bar, for respondent-respondent Tiger Inn

(Lum, Hoens, Abeles, Conant & Danzis, Roseland, attorneys).

Richard E. Shapiro, Director, Div. of Public Interest Advocacy, argued the cause for amicus curiae Public Advocate (Thomas S. Smith, Acting Public Advocate, attorney).

Denise Reinhardt submitted briefs on behalf of amicus curiae New Jersey Coalition on Civ. Rights Enforcement (Reinhardt & Schachter, Newark, attorneys).

Tanya E. Pushnack submitted a letter brief on behalf of amicus curiae Princeton Undergraduates for Co-Educated Eating Clubs (Zazzali, Zazzali, Fagella & Nowak, Newark, attorneys).

Joan Pransky submitted a brief on behalf of amici curiae American Jewish Congress, Anti-Defamation League of B'nai B'rith and Community Relations Committee of the United Jewish Federation of MetroWest (Joan Pransky, attorney; Joan Pransky, Montclair, and Jeremy S. Garber, New York City, on the brief).

The opinion of the Court was delivered by

GARIBALDI, J.

This appeal concerns whether the New Jersey Division on Civil Rights (Division) followed the proper administrative procedure in concluding that it had jurisdiction under the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 to -42 (LAD), over the Tiger Inn and Ivy Club (Clubs), all-male eating Clubs at Princeton University. Central to the resolution of the jurisdictional issue is whether the Clubs are "places of accommodation" within the meaning of LAD, or are exempt from

LAD because they are "distinctly private." The Division found that the Clubs have an integral relationship of mutual benefit with Princeton which deprives them of private status and makes them subject to the Division's jurisdiction. Whether the Clubs are "distinctly private" or have lost claim to private status by their association with Princeton University is initially a factual issue. The Clubs assert that material facts remain in dispute on this issue and hence, they should have been afforded a plenary hearing before the Division determined that it had jurisdiction. The Division and plaintiff assert that there are no material facts in dispute relevant to the issue of jurisdiction.

The procedural record discloses that the parties had numerous hearings before the Division and the Office of Administrative Law at which time they presented their factual contentions and legal arguments. The Appellate Division also reviewed this case twice. Based on our examination of the record, we find that this procedure accorded the parties their administrative due process rights. Moreover, we conclude that there are no disputed facts that are material to the jurisdictional issue; hence, the Division properly invoked its jurisdiction. We also conclude that the Division properly found that the clubs discriminated against plaintiff on the basis of her gender and affirm the Division's remedies against the Clubs.

I

A. *Procedural History Up To The Division's Findings of Probable Cause.*

This case has a protracted history. Plaintiff, Sally Frank was a student in Princeton in 1979 when she

commenced the action. She since has graduated from Princeton, finished Law School, and is now counsel of record in this case. The record consists of 31 volumes, comprising nearly 6,000 pages.

The saga began in February, 1979 when Frank filed a complaint with the Division against Princeton and three male-only eating clubs associated with Princeton, namely, Ivy Club, University Cottage Club[1] and Tiger Inn, alleging that they had discriminated against her on the basis of her gender in violation of LAD. The Division refused to process that complaint.

In November of 1979 Frank filed another complaint, again alleging gender discrimination by the same parties. This complaint asserted that the Clubs were "public accommodations" because the Clubs functioned as "arms of Princeton. * * * " and because they were public accommodations in their own right. The Club filed answers denying that they were places of public accommodation and denying that they functioned as arms of Princeton. They claimed they were "bona fide private clubs" and therefore exempt from jurisdiction under *N.J.S.A.* 10:5-5*l*.Princeton filed an answer denying that it was a place of public accommodation "with respect to the eating and social activities of its students." Princeton also claimed that as a factual matter, the Clubs were not part of the University.

The Civil Rights Division dismissed Frank's complaints. The Appellate Division, emphasizing that it was

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[1] The Cottage settled with Sally Frank and was dismissed from the case. It agreed to admit women members.

taking no position of the merits, vacated the Division's order because of the Division's failure to make findings of fact and to grant a hearing, and remanded the matter to the Division for further proceedings consistent with its opinion. 228 *N.J.Super.* 40, 548 *A.*2d 1142.

The Division moved for reconsideration and for a clarification of the requirements of the remand. In its motion the Division advised the court of the procedure it intended to follow on remand:

> In the absence of further guidance from the Court in this case, the Division would propose initially to hold a fact-finding conference in order to determine which if any, of the mass of facts collected by the Division are actually in dispute, and whether there are further facts which the parties wish to bring to the Division's attention. Thereafter, if there were disputed issues of material fact, it would be appropriate to hold a plenary contested case hearing to determine jurisdiction. *If there are no material facts in dispute, the Division would issue a determination of jurisdiction containing appropriate findings of fact and conclusion of law, with further proceedings to be held if the Division has jurisdiction.* As previously indicated, however, the Division is of course willing to follow whatever procedures the Court mandates.

(Emphasis added).

The Appellate Division denied the Motion for Reconsideration, without any guidance as to what procedure should be followed. The Division, therefore, followed the procedure outlined in its motion.

Shortly after the Motion to Reconsider was denied, James Sincaglia, Chief of the Bureau of Enforcement for the Division, brought the parties together to begin the fact-finding process. Frank served interrogatories on the Clubs and Princeton. The University responded by making hundreds of pages of documents available for inspection and copying to all parties. Many of these documents were then submitted to the Division. The Clubs served interrogatories on Frank. The parties also exchanged lists of proposed stipulations and each side noted on the other's list those stipulations that were acceptable and those that were disputed.

The Chief held two day-long fact-finding conferences in March and April, 1984. During the conferences the Chief lead the attorneys through the lists, noting those facts to which everyone agreed to stipulate and conducting a painstaking discussion on those facts disputed by the parties. In addition, the parties introduced documents, presented unsworn testimony, cross-examined witnesses and presented both oral and written legal arguments. The Chief accepted only documents that the parties agreed were authentic.

After the two-day conference hearings, the record was kept open until April 30, 1984 to allow the parties to submit additional documents. On May 31, 1984, the parties were served with the Chief's formulation of the stipulations discussed at the Conference (Accepted Stipulations and the Chief's Rulings). In his letter the Chief stated that "your review of these rulings will demonstrate that sufficient evidence existed in the record to issue Findings on the disputed stipulations. Therefore, no material facts remain in dispute. You will be expected to

raise any objections to the stipulations and rulings not previously proffered within ten days."

The stipulations fell into three categories:

(1) Stipulations accepted as proposed;

(2) Stipulations not accepted as proposed but resolved by the Division on the basis of evidence (mostly documentary) submitted by the parties; and

(3) Stipulations neither accepted nor rejected because they required legal conclusions of the kind that would be made by the Division upon review of the entire record.

The vast majority of the stipulations were accepted as proposed. Of 39 stipulations proposed by Sally Frank, 29 were accepted. Eight fell into the second category and two fell into the third category. The Clubs submitted 191 stipulations. 180 were accepted, ten fell into the second category and one required resolution by the Division upon review of the entire record. Thus, over 200 stipulations were accepted as proposed. It is the eighteen stipulations that fell into the second category of stipulations – those disputed by the parties but resolved by the Chief on the basis of documentary evidence, unsworn witness testimony and discussions at the Conference that give rise to the controversy underlying this appeal.

The parties filed comments and objections to the Chief's proposed rulings. The entire record was then transferred to the Director. The parties submitted briefs to the Director wherein Ivy and Cottage wrote "[n]ow after nearly 12 months of supplemental investigation, this matter is being submitted to the Director of the Division on

Civil Rights for a final ruling as to whether jurisdiction exists." Tiger acknowledged that its brief was being submitted "on the sole issue raised by this proceeding: Whether the Division has jurisdiction over Tiger under the Law Against Discrimination."

The Division issued a "Finding of Probable Cause" on May 14, 1985 (the "Finding"). The Finding established that the Division had jurisdiction over the Clubs and that probable cause existed to believe that the Clubs had discriminated against women. The bulk of the document was dedicated to a discussion of jurisdiction. At the beginning of the jurisdiction portion of the Finding, "Undisputed facts" are set forth, extracted from Stipulations submitted and agreed to by the parties and from documents submitted by them. Authenticity of the documents is not in dispute.

B. *Facts Derived From the Division's Finding of Probable Cause*

Princeton University is a private, non-sectarian institution of higher education, founded in 1746. The University is located in Princeton, New Jersey. From 1746 to 1968. Princeton University admitted only male students as undergraduates. In 1969, the University for the first time admitted women as undergraduate degree candidates.

From approximately 1803 to 1843, Princeton University required all undergraduate students to take their meals in commons operated by the college steward. In 1843, Princeton permitted its undergraduate students to board off-campus. The Princeton college refectory burned

down in 1856 and was closed for fifty years. During that time, all students took their meals in boarding houses that were not affiliated with the college. In the mid-1800's several groups of Princeton students formed "select associations" to reduce the cost of their off campus living and dining expenses. By 1876 twenty five "select associations" or eating clubs were in existence.

The club system associated with Princeton University, which began with these "select associations," presently [sic] consists of thirteen clubs, eight of which are non-selective clubs and five of which are selective clubs. Campus, Charter, Cloister Inn, Colonial, Dial Lodge, Elm, Quadrangle and Terrace are the eight non-selective clubs. These clubs, formerly all male and selective, are now co-ed. The non-selective clubs offer social, recreational and dining activities.

Admission to the non-selective or open clubs is by a lottery system. Students who are not accepted into the "open clubs" of their choice are given the opportunity to go through subsequent lottery rounds at any "open club" that has additional available contracts to offer.

The five selective clubs are Ivy, Cottage, Tiger Inn, Cap & Gown and Tower. The selective clubs also offer social, recreation and dining activities. Tower, Cap & Gown and Cottage accept male and female members. From their inception until the present, Ivy and Tiger have only accepted male members.

Ivy was found [sic] in 1879. During its 110 years it has occupied four different club-houses, all of which it either owned or rented independently of Princeton University. It now owns the land and clubhouse at 143 Prospect Street in Princeton and pays all of its local and state

taxes, maintenance, utility and insurance costs. Ivy is incorporated in New Jersey, tax-exempt under the Internal Revenue Code and at one time had a liquor license. It is supervised by a Board of Governors. It has 3 classes of membership: honorary, graduate and undergraduate.

As of 1984, Ivy had 1,500 graduate members, 79 undergraduate members and 39 sophomores who accepted bids. Ivy's Constitution does not require that the Club's membership be restricted to men. Tiger was founded in 1890. Its history parallels that of the Ivy. Its membership rules and constitution are also similar to Ivy's.

Membership in the selective clubs is presently by invitation only. The general public is not invited to join Tiger or Ivy. Bicker is the term the five selective Clubs use for the process of interviewing and selecting new members. The sophomore class at one time administered Bicker, but ceased doing so in 1978. Since 1978, the sophomore class has not provided direct funding for the Bicker process. The process is now totally funded by the individual Clubs.

Since at least 1977, there has been a fall and spring Bicker. Spring Bicker has taken place in late January to early February. Fall Bicker is an optional activity for selective clubs and is usually restricted to seniors. Two purposes of fall Bicker are to fill section sizes to their optimal level and provide new members with an introduction to the Bicker process.

The Clubs administer fall Bicker entirely. The Committee on Bicker Administration (CBA), made up of students, presently coordinates spring Bicker. The CBA has,

in the past, used University office space to coordinate its week-long Bicker effort. At one time the University assessed no rental charge, but does so now.

The Bicker process is divided into steps: (1) registration; (2) Bicker sessions; (3) bid sessions, and (4) sign-in. Since at least 1977, Bicker sessions consist of visits made by the Bickerees to each of the selective clubs, and are held every night. The primary purpose of Bicker sessions is to give Club members the opportunity to individually evaluate the Bickerees as prospective Club members.

A bid session is a meeting of the Club members to decide which Bickerees will be invited to join a selective eating Club. A bid is an invitation to join one of the selective Clubs. There is not a set number of bids that each Club is required to offer, and the process whereby Bickerees are extended invitations to join varies from Club to Club. Since at least 1977, after each Bicker session, members of Tiger Inn and Ivy have submitted written comments to their Bicker chairman about each Bickeree with whom they had significant contact. These confidential comments are read at bid sessions.

Undergraduate members of Ivy are elected by consensus at a meeting of a majority of its current membership. Tiger Inn requires unanimous agreement of its undergraduate members for a sophomore to be admitted. Cap & Gown, Cottage and Tower require a 2/3 majority vote of their memberships for a sophomore to be admitted. In 1984, 114 sophomores completed Bicker at Ivy: 40 received bids and 19 accepted their bids. At Cottage Club, 107 sophomores completed Bicker: 72 received bids and 69 accepted. At Tiger Inn, 112 sophomores completed

Bicker: 91 received bids and 70 accepted. Cap & Gown had 114 sophomores who completed Bicker: 85 received bids and 70 bids were accepted. At Tower, 106 sophomores completed Bicker: 71 received bids and 69 bids were accepted.

The Clubs require their undergraduate members to pay an initiation fee together with a yearly fee for board and social activities. All fees are paid by the student directly to the clubs. These fees are not part of Princeton University's undergraduate tuition. Membership dues and contributions to Ivy and Tiger are not tax deductible as contributions to educational institutions. Respondent Clubs provide food for consumption on their premises by contract with club members, the club agreeing to provide specific meals to their members for specific sums. All the Clubs charge members who bring a guest to dinner for the guest's meal unless the guest holds a University dining contract, and both the club member and the guest uses the Meal Exchange Program.

Respondent Clubs at times have paid for and placed announcements in *The Daily Princetonian* which advertise Bicker, open-house-events and parties. The Clubs are rented out from time to time to club members or their relatives for private non-club functions which are attended by non-members. Employees of the Clubs are not employees of Princeton University. Employees of the clubs are not covered by University-provided benefits such as health insurance, pension plans or Social Security contributions.

The Clubs use zip code 08540. Zip code 08544 is only used by Princeton University. Respondent clubs do not

have campus mail delivery, nor can they use Princeton University's non-profit mailing permit.

Princeton University requires all freshman and sophomore students to have University dining contracts. Princeton University juniors and seniors generally dine in one of the following ways (figures are for 1983-84): DS (dining service) contracts (191); club membership (1570); living off-campus (98); living in Spelman Hall, apartment-style with kitchens (156); living at 2 Dickinson Street and participating in the co-op there (20); and living in other upper-class residential halls and eating in an undetermined manner (194).

Adlai Stevenson Hall is a University-operated facility consisting of two buildings at 83 and 91 Prospect Street. It was originally founded in 1970 after the University purchased the facilities of Court and Key & Seal Clubs, both now defunct. Any junior or senior may hold a meal contract at Stevenson Hall. In addition, a limited number of juniors and seniors may hold a meal contract at each of the residential colleges. Some of these are "Resident Advisors," appointed to counsel freshmen and sophomores. Others are selected through a "college lottery" system, under which a small number of upperclassmen are allowed to continue to reside in the residential college where they resided as underclassmen.

The Club system has consistently been the most popular eating option available to upperclass students. In school year 1983-84, 1570 out of 2230 of Princeton's juniors and seniors took meals at one of the eating clubs.

Three meal-exchange programs exist between the University food services and Respondent Clubs. The general Meal Exchange Program allows students to dine with their friends at other facilities at no additional cost. The Program is administered, and all costs are jointly shared, by the Inter-club Council and the University's Department of Food Services. The general Meal Exchange Program works as follows: if a Club member invites a Princeton student having a University dining contract to a meal at his club as his guest, and the guest reciprocates and invites the club member to dinner at a University dining facility within one calendar month, neither party will be charged for the guest's meal. If no reciprocal meal is exchanged within one month, the sponsor will be charged for the guest's meal by his Club or the University.

The Upperclass Choice Meal Exchange provides sophomore class members with the opportunity to eat in facilities they may select for their junior year without the expenditure of additional funds. The meal exchange operates during the fall from the first Monday of November through the first Thursday in December. The precise dates are established by the Upper Class Choice Committee and the University Department of Food Services. The program is for dinner meals, typically Monday through Thursday. The Department of Food Services reimburses the individual clubs per dinner meal for contract-holders who participate in the program.

The Sophomore Club Meal Participation Program allows sophomores who are new members to dine at a club during the spring semester of their sophomore year. The University reimburse the Club a percentage of the

University food costs for the meal. At Ivy, the sophomore member is charged the difference between the University's reimbursement and the club's charge for the meal.

University proctors are not responsible for the security at Tiger Inn or Ivy and do not regularly patrol the Clubs' grounds or premises. Princeton University students involved in off-campus altercations are subject to discipline by the University. Princeton University has no authority to discipline a graduate member of Tiger or Ivy for objectionable conduct by that graduate member on the club's premises. Tiger and Ivy discipline their own members for disturbances connected with the clubs regardless of whether any action was taken by public or University authorities.

From at least 1977, Tiger and Ivy have not been listed as officially recognized student organizations by the Dean of Students of Princeton University. Princeton University does not presently provide any assistance to Tiger or Ivy in their fund-raising efforts. However, the Princeton University Alumni Records and Mailing Services ("ARMS") makes certain services available to University alumni, including supplying updated mailing list and processing mailings. There is a single rate-sheet for all such services, applicable to the eating clubs and to other outside organizations. Tiger and Ivy have used some of these services.

A review of documents submitted from the late 1960's and mid-1970's give some indications of the relationship between Princeton University and the Clubs during two time frames – just prior to the admission of women to Princeton University in 1969, and just prior to

Sally Frank's admission to Princeton in 1976. In 1967, as part of the Minutes of the May 1, University Faculty Meeting, an Interim Report of the Subcommittee of the Faculty Committee on Undergraduate Life described the relationship between the University and the Clubs as follows:

> The University itself provides no dining facilities for most upperclassmen but sanctions the private eating clubs as virtually the only dining and recreational facilities regularly made available to approximately ninety per cent of the upperclassmen. There are not alternatives in suburban Princeton or in the Wilson Society that could accommodate a large percentage of those undergraduates.
>
> Once considered tangibly "off" campus, the clubs are now visibly "on" it, surrounded [by many campus buildings]. Yet the University does not own the clubs or their land, and it does not manage their operations or purchase their supplies. * * * The quality of the food, the physical facilities, and the activities vary from club to club.
>
> The University's responsibility for the utilization of the clubs by the undergraduates is revealed in many ways. Resolutions of the Trustees have established their jurisdiction over undergraduate membership in the clubs. A week's recess is allowed in the University calendar each year for Bicker. Information on Bicker is provided for sophomores with the assistance of the office of the Dean of Students, who exercise some supervision over the proceedings. Conduct of the undergraduate members within clubs is regulated by the University under the

> Gentleman's Agreement which delegates responsibility for enforcing its provisions largely to the undergraduate members and the officers of the individual clubs, under the supervision of the Undergraduate Inter-club Committee. University regulations govern the board payment of scholarship students, and the University endorses an agreement that protects the financial stability of the clubs as a group by limiting the size of the membership in any one of them. The University Health Services are implementing their proposal for the inspection of club kitchens. Intramural sports for upperclassmen are organized on the basis of the clubs (and the Woodrow Wilson Society).
>
> In sum, the University and the clubs are now mutually dependent on each other. The clubs depend on the University for an annual supply of undergraduates that virtually insures the continuance of the system; the University depends on the clubs for dining and recreational facilities. In the past, the University has exercised its responsibility for providing these facilities to upperclassmen largely by delegating it, with a minimum of surveillance and a minimum of initiative to improve the clubs. [MINUTES OF THE UNIVERSITY FACULTY MEETING OF MAY 1, 1967].

In 1973, the University proposed to the Clubs a jointly-funded study of the club system by Haskins and Sells. The purpose of the Study was "to outline all of the options available to develop a system of operation that would be financially and socially viable to the Clubs and to the University." The study was proposed at a time when the Clubs were foundering financially due to a

decline in membership. There was apprehension that some Clubs might go out of business.

The Haskins and Sells Study, released in April of 1975, set forth a long list of options for dealing with the problems facing the Club system. These options fell into three general categories: options requiring University policy changes, options involving only the Clubs; and options requiring ongoing University involvement with the Clubs.

By October 23, 1975, the University took short-term actions to assist the Clubs, which included help in the collection of overdue accounts and planning for Club participation in the freshmen orientation program. Other actions taken by the University within the next year included:

> (1) Adoption of the Board of Trustees resolution "reaffirming the University's view that the Club system provides an important social option for undergraduates and expressing again the sense of the Board that this form of social alternative should continue to be available." (2) The Office of the Dean of Student Affairs assisted the clubs in collecting overdue bills from their members. (3) The new student handbook included a description of the Club system. (4) Arrangements were made for a presentation of the clubs to be a part of the freshman orientation. This proved to be a successful tactic in improving membership. (5) Assistance was provided to the clubs for snow removal from their front sidewalks by University personnel.

Sally Frank was a student at Princeton University from September 1976 through June 1980, when she graduated. During that time, Sally Frank did not join any of the non-selective eating clubs. During spring 1979 Bicker, Sally Frank was permitted to Bicker at the Ivy Club. However, Ivy's president told her that she could speak to Ivy members only when there were no sophomore men waiting to speak to Ivy members. Sally Frank spoke to at least one Club member at each of the Bicker sessions. She did not receive a bid from Ivy. During spring 1979 Bicker, Sally Frank Bickered at Tower Club and Cap & Gown. She did not receive a bid. During Bicker of 1980, Tiger Inn, Cottage and Ivy refused to permit Sally Frank to Bicker.

From these facts, the Division issued eleven factual conclusions. The Clubs essentially agree that the Division's Finding of Probable Cause was based only on stipulated facts. Their dispute is that the Division's factual conclusions are unjustified by those disputed facts. The factual conclusions follow:

> 1. A Club system provides dining facilities for a majority of upperclass students attending Princeton University.
>
> 2. Respondent Clubs are part of this Club system associated with Princeton University.
>
> 3. Princeton University relies on these Clubs to feed a majority of their upperclass students.
>
> 4. Without the Clubs, Princeton University would incur substantial costs and would have to make major changes in the provision of dining services for upperclass students.

5. Princeton University has an interest in the continued viability of the Club system and has taken actions based on that interest.

6. The Clubs are characterized by the Clubs and Princeton University as servicing Princeton students and recruit members almost exclusively from Princeton University.

7. The Clubs work with one another and with Princeton University through organizations like the C.B.A. and the Inter-club Council.

8. The link that ties the individual Clubs together is their association with Princeton University.

9. The Clubs would not continue in their present form with Princeton University.

10. Princeton University and the Clubs are integrally connected in a mutually beneficially relationship.

11. Non-members of respondent Clubs, particularly but not exclusively, Princeton University students, can participate in many of the respondent Clubs' activities and use the respondent Clubs' facilities.

The Division concluded based on these facts that the relationship between the Clubs and Princeton University is one of integral connection and mutual benefit that negates the Clubs claims that they are "distinctly private" entities. The Division rejected the argument that the Club members' constitutional free-association rights would be violated if the Clubs were subject to LAD. The Division then discussed briefly the issue of discrimination. On the basis of undisputed facts, the Division determined that

probable cause existed to believe that the Clubs discriminated on the basis of gender.

C. *Procedural History After Division's Finding of Probable Cause.*

After the Finding of Probable Cause was issued, Frank requested that the matter be transferred to the Office of Administrative Law (OAL). In July 1985, the case was filed as a "contested case" at OAL. Sally Frank moved for Partial Summary Decision on the issue of jurisdiction. The Clubs opposed the motion. The ALJ requested the parties to advise him of any material facts in dispute. The Clubs submitted no affidavits to the ALJ other than a certification of attorneys for Ivy, which recited only the procedural history of the proceedings before the Division. The parties placed before the ALJ the agreed stipulations of fact and a list of the documents which had been submitted in evidence before the Division. Both Ivy and Tiger also submitted briefs in response to Frank's motion. Those briefs, however, recited very few alleged material facts in dispute. The only facts specifically alleged to be in dispute were the selectivity of the hat bid procedure, the existence of an Inter-club agreement, and the extent to which club facilities are available to the general public. In response, Frank pointed out that the Clubs had failed to identify material facts in dispute and had failed to identify any specific document that they claimed was irrelevant.

Based on the submissions before him, the ALJ granted Frank's motion and, on December 12, 1985, filed an Initial Decision granting Partial Summary Decision on

the jurisdictional issue. The ALJ's decision was based on a determination that the Division's Finding should be construed as the final agency determination on the issue of jurisdiction. This determination was based on two factors. First, the ALJ found that the Division had intended its finding of jurisdiction (as opposed to the finding of probable cause on discrimination) to be final. Second, the ALJ considered the determination of jurisdiction to be the "law of the case" because (1) the finding of jurisdiction had been "careful, thorough and comprehensive"; (2) the procedure had been fair; (3) the legal analysis had been extensive, cogent, well-reasoned and persuasive; and (4) the re-determination of the issue would be "duplicative, repetitious, time-consuming and wasteful." The ALJ also found there were no material facts in dispute and that the facts that the Clubs alleged were disputed had been found to be immaterial. For example, the ALJ clarified that the Inter-club Agreement was not admitted for its truthfulness but to show that ties existed between the respondent Clubs, the other Clubs and Princeton.

After giving notice that she would do so and receiving exceptions but no affidavit in support of those exceptions, the Director on February 16, 1986, issued an Order of Partial Summary Decision on jurisdiction which adopted the recommendations of the ALJ. The Director's Order of Partial Summary Judgment stated that "after a careful review of the materials submitted to ALJ Miller and the exceptions filed by the clubs," the Director found "[n]o *genuine* issue of *material* fact remain[ing] in dispute." Because no material facts were in dispute the Director found that a full hearing on jurisdiction at OAL

would be "duplicative, repetitious, time consuming and wasteful."

In support of her finding that no full hearing would be required, the Director reviewed the Clubs' opportunity to demonstrate to the ALJ what facts were allegedly in dispute, and the fact that the Clubs had submitted no affidavits in support of their assertions that there existed disputes concerning material issues of fact. The Director also noted that the two documents claimed by the Clubs to be inaccurate were party-admissions by Princeton University, then a Respondent, and that the Clubs had submitted no evidence to contest these documents. The Director also addressed fully the Clubs' arguments concerning facts alleged to be in dispute. The Director deemed the existence of an Inter-club agreement to be immaterial in light of the undisputed facts that the agreement was published in a University booklet and that unsigned copies were available at the Dean's office. Even assuming no agreement was ever executed, the University held the agreement out to the students as existing. This, not the actual execution, was the importance of the agreement." The Director also noted that although the Clubs alleged that there were disputes of fact concerning the hat-bid and the availability of public access to the clubs, her conclusions concerning those issues were drawn either from stipulations or from the testimony of the Clubs' own witnesses and affidavits submitted by the Clubs.

The Director also pointed out that the Club's dispute over certain conclusions in the jurisdictional finding did not raise issues of material fact but rather were simply disputes over conclusions drawn from undisputed facts.

Examples of such conclusions include the finding that Princeton University and the clubs are "integrally connected" and that there was a significant relationship between the University and the Clubs. The Director also noted that the Clubs had failed to point to any evidence that could be introduced at a hearing that would raise a dispute concerning these conclusions. Finally, the Director observed that the Clubs had had at least three opportunities to place before the Director any evidence that they wished to have her consider and to demonstrate that there were material issues of fact in dispute. The Director concluded that the clubs had failed to "demonstrate . . . further facts or evidence that could be introduced to justify or necessitate a full hearing."

The Director then addressed the Clubs' argument that "regardless of the process implemented by the Division on Civil Rights, they [were] entitled to a full hearing at the Office of Administrative Law based on the Administrative Procedure Act, the guarantees of due process and fundamental fairness and the Appellate Division Decision remanding the case to the Division." Relying on *Cunningham v. Civil Service Comm'n*, 69 *N.J.* 13, 350 *A.*2d 58 (1975), the Director noted that the Clubs were "entitled to a hearing only [sic] if they made an offer of proof supported by an affidavit to show genuine issues as to any material fact." Since no material facts were shown to be in dispute, the Director concluded, "the Clubs were given all they were entitled to – 'the opportunity to present argument orally or in writing * * * .' " On the basis of the foregoing, the Director affirmed the finding of jurisdiction and remanded the matter to the ALJ for further proceedings on the issues of liability and remedy.

The University Cottage Club settled with Frank on February 24, 1986. The ALJ issued an Initial Decision on liability on June 16, 1986, granting Frank's Motion for Partial Summary Decision. he ruled that liability existed with regard to the two Clubs on the basis of undisputed facts. Summary decision was not proper with regard to Princeton, however, because more information was necessary to address the issue of what constituted the alleged "aiding and abetting" discrimination by Princeton. On July 22, 1986, Frank and Princeton entered into a Stipulation and Order of Partial Settlement. Princeton continued to participate in the proceedings because of the potential involvement it would have in whatever remedies were ultimately ordered by the Division.

On July 28, 1986, the Director adopted the ALJ's Initial Decision of Partial Summary Decision on liability respecting the two clubs. The Director found the claims against Princeton were moot based on the settlement agreement between Frank and Princeton. There was no appeal from that determination. The Order remanded the matter back to the OAL for further proceedings on damages and remedies to be afforded Frank. Following that remand, the ALJ conducted plenary hearings for six days between July 29 and August 6, 1986, during which sworn testimony, subject to cross-examination, and additional documents were admitted as evidence.

On January 29, 1987, the ALJ issued his Initial Decision on the issue of damages and remedies. His decision proposed the following remedies:

(a) that Ms. Frank be awarded $2,500 in compensatory damages by the two Clubs;

(b) that Ms. Frank *not* be awarded membership in either club;

(c) that the two Clubs should sever certain ties to Princeton in order to attain 'distinctly private' status under *N.J.S.A.* 10:5-5(*l*);

(d) that Princeton should avoid reference to the two Clubs as being affiliated or connected with the University in all future publications.

On May 26, 1987, the Director issued the Final Administrative Decision and Order which adopted the ALJ's recommendation denying club membership to Frank, increased the award of humiliation damages to $5,000 and rejected the ALJ's recommendation that the Clubs be ordered to sever their ties with Princeton instead of ordering them to admit women. The Director found that such a result was neither possible nor desirable and "that in any event ordering the clubs to sever the ties instead of ceasing their discriminatory practices was counter to the purpose of LAD." The Director entered a cease and desist order directing the clubs to admit women as members.[2]

Ivy and Tiger appealed to the Appellate Division. The Appellate Division partially reversed the Division and remanded the case to the Division for new proceedings. The court rejected the Clubs' contention that they

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[2] Both clubs recently voted to end their policy of not admitting women. In order for the policy change to become final, however, each club will need to confirm its vote within one year of the initial vote and then each club's graduate board consisting of alumni must approve the policy change.

had a right to a hearing *before* the Division made its threshold determination of probable cause. The court likewise rejected the contention that the fact-finding conference should have been conducted by the Director herself and not by the Chief of the Enforcement Bureau.

The court based its reversal, however, on the fact that the Chief had exceeded his authority by resolving disputed facts and that the Division, by relying on the facts as resolved by the Chief, had abused its discretion. Thus, according to the Appellate Division, the Division had bootstrapped disputed facts into undisputed facts and then relied on those facts in coming to its conclusions. Accordingly, the Appellate Division found that there were material facts in dispute concerning the jurisdictional issue. Hence, the Clubs were entitled to a plenary hearing on the question of jurisdiction. The Appellate Division, therefore, reversed the finding of jurisdiction and probable cause, vacated the order of remedies, and remanded the case to the Division with instructions to forward the case to the OAL to conduct a trial-type hearing on the issues of (1) jurisdiction, (2) discrimination and (3) remedy.

Sally Frank then petitioned this Court for certification, arguing that the Appellate Division failed to defer to the Division's substantively correct and procedurally fair decision, designed to eradicate a particularly offensive form of discrimination, and that failure to correct the Appellate Division's erroneous decision to remand will result in significant individual and societal harm.

After first considering the matter, we remanded the case to the Appellate Division, specifically "for the limited purpose of clarifying [Appellate Division] opinion to indicate what material facts remain in dispute, the determination of which is essential to a meritorious disposition of the case . . . "

The Appellate Division filed a *per curiam* opinion stating that "all unstipulated facts, documents and other evidence are material and remain in dispute and must be resolved in a trial-type hearing before there can be a disposition of the case on the merits." We granted certification, 117 *N.J.* 627, 569 *A.*2d 1330 (1989).

II

A. *Necessity of Plenary Hearing*

It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case. *Cunningham v. Dept. of Civil Service,* 69 *N.J.* 13, 24-25, 350 *A.*2d 58 (1975). The mere existence of disputed facts is not conclusive. An agency must grant a plenary hearing only if *material* disputed adjudicative facts exist. *Bally Mfg. Corp. v. Casino Control Com'n,* 85 *N.J.* 325, 334, 426 *A.*2d 1000 (1981), app. dis. 454 *U.S.* 804, 102 *S.Ct.* 77, 70 *L.Ed.*2d 74 (1981); *Cunningham v. Dept. of Civil Service,* 69 *N.J.* at 24-25, 360 *A.*2d 58. *N.J.S.A.* 52:14B-9. The key issue therefore is whether any material facts remained in dispute when the Director made her final decision. Based on an examination of the record we find that no material facts in dispute exist with respect to the issue of jurisdiction

and that the administrative procedures followed fully comported with administrative due process.

The procedural history discloses that this is not a case where the parties did not have a hearing or an opportunity to present their evidence and legal positions. The parties had a two-day fact-finding conference. While testimony at the fact-finding conference was unsworn, parties were allowed to present and cross-examine witnesses, introduce documents and question and examine the documents. Indeed, the conference resulted in 200 factual stipulations.

Moreover, *N.J.A.C.* 1:1-12.5(b) provides in relevant part:

> When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.

Cunningham v. Civil Service, supra, 69 *N.J.* at 25, 350 *A.*2d 58 (party opposing summary disposition motion must submit affidavits to support claim that material facts are in dispute). The procedural history discloses that the Clubs had several opportunities specifically to submit affidavits setting forth the material facts in dispute to the Chief, the Director and the ALJ. The record discloses that the Clubs made minimal efforts to identify allegedly disputed facts and submitted no affidavits in response to Frank's motion for partial summary judgment.

The major disputes between the parties on the jurisdictional issue all relate to the fact-finding conference

and the Division's Finding of Probable Cause. Specifically:

1. Whether the Clubs were led into a "trap" that the Fact-Finding Conference could result in the resolution of the jurisdictional issue;

2. Whether Chief Sincaglia's resolution of eighteen disputed facts were relied on by the Division in its jurisdictional decision; and

3. Whether there are any material facts in issue relevant to the jurisdictional issue.

B. *The Fact Finding Conference*

First, we reject the Clubs' assertion that they were ignorant of the possibility that the results of the fact-finding conference would determine jurisdiction. 228 *N.J.Super.* at 61, 548 *A.*2d 1142. The Division repeatedly assured all of the parties that the fact-finding conference was intended to produce a binding determination on the issue of jurisdiction.

The first mention of the fact-finding conference occurs in the Division's petition for rehearing. In that petition, the Division proposed the fact-finding conference as the procedure it would employ in the first instance. In that proposal, the Division clearly stated that the fact-finding conference would lead to a "determination of jurisdiction" if no material facts were in dispute.

This proposal was restated in subsequent letters to the parties advising them of the procedure. In a letter

dated October 5, 1983, the Director advised the parties that

> [a]s indicated herein, the purpose of the Fact-Finding Conference is to make a preliminary determination as to whether there are material facts in dispute. In the event that there exists [sic] genuine issues of material fact, the Division will conduct a public hearing to resolve the disputed issues. The parties will then be required to submit proposed findings of fact and conclusion [sic] and thereafter the Director will issue a decision as to jurisdiction.

In a letter to Sally Frank dated October 26, 1983, with copies to all parties, the Director again set out the purpose of the Conference:

> [t]he Fact-Finding Conference hopefully will resolve the jurisdictional issue in this case. * * * If jurisdiction is found to exist, there will be an additional conference regarding the probable cause issue. * * * In the event that the Fact-Finding Conference does not resolve the issue of jurisdiction, I will again review the matter for possible submission to a hearing.

If there was some confusion about the scope of the Conference it only galvanized the parties to investigate thoroughly the potential ramifications of this fact-finding process. All of the parties wrote to the Division requesting clarification of the procedure and its possible effect. Interrogatories were circulated to help generate a universe of stipulation facts and those interrogatories were, themselves, the subject of some confusion. The Clubs were not alone in their concern about the extent of protection to be afforded by the procedure. Frank wrote to

the Chief to express her belief that she was not waiving any right to a hearing by participating in the conference. Despite some uncertainty about these unusual proceedings, discovery lumbered forward through the winter of 1983 and 1984. During that time, the Division steadfastly maintained its position that the Conference, while somewhat informal, could resolve the issue of jurisdiction if, when it was done, no relevant material facts remained in dispute. For example, in a letter from the Chief to Frank, copies of which were sent to all parties, the Chief expressed his opinion that the issue of jurisdiction would be resolved by undisputed facts adduced at the Conference:

> I must repeat that in compliance with the decision of the Appellate Division, the Division on Civil Rights will conduct a fact finding conference to determine which material facts remain in dispute and to permit the parties to bring additional information to the attention of the Director.
>
> If there are disputed issues of material fact it would then be appropriate to conduct a plenary hearing. See *Cunningham v. Department of Civil Service*, 69 *N.J.* 13, 19-24 [350 *A.*2d 58] (1975).
>
> Given that the bulk of the facts in this case should be undisputed, I am optimistic that all of the material facts will be resolved at the fact-finding conference.
>
> However, participation in the conference will not prejudice your right to a hearing if appropriate.

See also letter of October 26, 1983 from the Director to Princeton's attorney. ("The Fact Finding Conference

* * * will be solely for the purpose of determining jurisdiction over the Clubs * * * ").

The Fact-Finding Conferences were held on March 12, and on April 3, 1984. At the outset Chief Sincaglia reminded the parties that the Conference would resolve the jurisdictional issue if no material fact disputes arose:

> [T]he fact finding conference will make a preliminary determination as [sic] whether there are facts that are disputed, genuine issue of fact. To resolve the disputed issue, [sic] the parties will then be required to produce findings of fact and conclusions of law, and thereafter the director will issue a decision as to jurisdiction. *If there are no material facts and disputes at the end of the fact finding conference,* * * * you will issue proposed findings of fact and conclusions of law to me. Then the director will issue the findings as to jurisdiction. (emphasis added).

Thus, the parties were reminded several times that the Conference might prove conclusive. Moreover, the attorney for the Clubs explicitly acknowledged that she understood that the fact-finding conference was going to settle the issue of Division jurisdiction.

Uncertainty about the nature and effect of the Conference seems to have made the parties especially cautious. Far from lulling them into a false sense of security, this unfamiliar procedure heightened the parties' caution. The letters seeking clarification from the Division indicate that the Clubs' and the University were acutely aware that the jurisdictional question might be resolved on the facts adduced at the Conference.

C. *Materiality of Facts*

In analyzing the materiality of the facts, it is critical to understand that the Division rejected the theory that the Clubs themselves were places of accommodation. Instead, the Division premised its conclusion that the Clubs were not distinctly private on its finding that "the relationship between the Clubs and Princeton University is one of integral connection and mutual benefit." Jurisdiction over the Clubs is, essentially, based on jurisdiction over Princeton and supported by undisputed facts of the present day interdependence of the Clubs and Princeton. There no longer is any question that Princeton is a place of public accommodation under LAD. *Peper v. Trustees of Princeton University*, 77 *N.J.* 55, 67-68, 389 *A.*2d 465 (1978).

In reaching its determination that the Clubs lacked a distinctly private character because of their close connection with the University, the Division relied on three principles. First, claims that a club is distinctly private require close scrutiny by the Division and the courts. All facts must be carefully reviewed so that "[no] device, whether innocent or subtly purposeful, can be permitted to frustrate the legislative determination to prevent discrimination." *Clover Hill Swimming Club v. Goldsboro*, 47 *N.J.* 25, 34, 219 *A.*2d 161 (1966) (quoting *Jones v. Haridor Realty Corp.*, 37 *N.J.* 384, 396, 181 *A.*2d 481 (1962)).

Next, the Division relied on "a significant body of authority supporting the proposition that associations that ordinarily would be exempt from laws applying to public or commercial enterprises will lose that exemption

if they alter their purely private character in some significant manner." (quoting *Franklin v. Order of United Commercial Travelers*, 590 *F.Supp.* 255, 260 (D.Mass.1984). The Division noted that one significant form of alteration is "a close association with a non-exempt organization or institution." (citations omitted).

The third principle is that the Division must "deal with the substance, rather than the form of transactions, and not permit important legislative policies to be defeated by artifices affecting legal consequences of the existing situation." (quoting *United States v. Beach Associates, Inc.*, 286 *F.Supp.* 801, 807 (D.Md.1968).

Applying these principles to the facts, the Division gave little weight to the Clubs' present financial and legal independence from the University. Neither did it rely heavily on evidence of historical connections between the Clubs and the University. Instead, the Division drew from undisputed facts demonstrating that "the University and the Clubs are in reality integrally connected." Specifically, the Division relied upon three factual conclusions in coming to its determination:

(1) The Clubs are held out as part of a club system which serves Princeton students;

(2) The Clubs draw their membership almost exclusively from Princeton University students; and

(3) Princeton relies on the club system to feed a majority of its upperclass students.

Each of the three factual conclusions is based entirely upon undisputed facts adduced at the Fact-Finding Conference.

The Clubs agree that the Director's Finding of probable cause is based on undisputed facts. The Clubs' dissatisfaction with the Directors' jurisdictional decision stems from the fact that the Director did not focus on the assiduously maintained legal separateness of the Clubs. Instead, the Division relied on the "gestalt" of the relationship between the University and the Clubs.

The finding of an integral and symbiotic relationship is based on the undisputed factual conclusions that the Clubs need the University and the University needs the Clubs, rather than on any particular act of control or integration. Where a place of public accommodation and an organization that deems itself private share a symbiotic relationship, particularly where the allegedly "private" entity supplies an essential service which is not provided by the public accommodation, the servicing entity loses its private character and becomes subject to laws against discrimination. *Hebard v. Basking Ridge Volunteer Fire Company*, 164 *N.J.Super.* 77, 395 *A.2d* 870 (App.Div.1978), *cert. den.* 81 *N.J.* 294, 405 *A.2d* 838 (1979) (volunteer fire department that refused to admit women had sufficient ties to municipality to make it subject to LAD); *Franklin v. Order of United Commercial Travelers*, 590 *F.Supp.* 255 (D.Mass.1984) (fraternal benefit society is not exempt from State anti-discrimination law because its relationship to city's police department deprives it of private status); *Adams v. Miami Police Benevolent Ass'n*, 454 *F.2d* 1315 (5th Cir.1972) *cert. den.*, 409 *U.S.* 843, 93 *S.Ct.* 42, 34 *L.Ed.2d* 82 (1972) (an association held subject to anti-discrimination law based on connection to city's police department, a non-exempt body). It would be disingeneous [sic] for the Clubs to assert that they could ever

exist apart from Princeton University. The Clubs gather their membership from Princeton and, in turn, provide the service of feeding Princeton students. Because of this, the Clubs lack the distinctly private nature that would exempt them from LAD.

The Division's conclusion that the Clubs are not distinctly private is based on undisputed evidence. The eighteen disputed facts are immaterial to the Director's analysis because they pertain primarily to whether the Clubs are private or public places of accommodation in their own right. Other facts are immaterial because they demonstrate either formalistic historical connections or the technical, legalistic independence of the clubs, rather than the present-day functional interdependence of the Clubs and Princeton.

D. *Eighteen Disputed Facts*

We believe that the Division's legal reasoning was sound and that the Clubs are subject to LAD based on the undisputed evidence concerning their interdependent relationship. Nonetheless, since the basis on which the Appellate Division remanded this case was that Chief Sincaglia improperly resolved 18 disputed stipulations, we will briefly analyze the disputed stipulations.

1. THE FIRST EIGHT STIPULATIONS PROPOSED BY FRANK

STIPULATION # 3 The Division holds that Princeton University, a private, nonsectarian institution of higher education, is a place of public accommodation as defined by *N.J.S.A.* 10:5-1, *et seq.*

Determination of this fact requires legal analysis, not a trial type hearing. *Peper v. Trustees of Princeton University, supra, 77 N.J.* at 67-68, 389 *A.2d* 465 (Princeton is a place of public accommodation).

> STIPULATION # 11 The record herein does not support the proposal that the all-male clubs regularly advertise their parties at other schools. The record does indicate, however, that students from other schools are made aware of and attend functions at the all-male clubs.

As acknowledged by counsel for Tiger Inn at the Conference, this stipulation was irrelevant. The stipulation tends to show that the Clubs were, in some sense, open to the public. The Division's jurisdictional finding, however, was not based on a determination that the Clubs were places of public accommodation in their own right but that the Clubs are subject to the LAD because they are involved in a relationship of integral connection and mutual benefit with Princeton University.

Stipulations # 14 through # 18 relate to the historical connection between Princeton and the Clubs. Stipulation # 14 relates to the origin of the Clubs. Stipulation # 15 deals with the historical existence of University-faculty oversight of the Clubs' operations. Stipulation # 16 relates to faculty participation in the selection of Club members at some time in the past. Stipulations # 17 and # 18 have to do with the disputed, but in any case discontinued, involvement of the Dean's office in setting the dates for club membership selection. *See also* Stipulation # 61, *infra*, at 108, 576 *A.*2d at 259 (stating that historically, Princeton has had some degree of involvement in formulating rules for Bicker). Even though all of

these stipulations go to the issue of a relationship between the Clubs and the University, none of them is material to the finding of jurisdiction. The "historical" component common to all of these stipulations makes them unnecessary to the Division's analysis. The Division's analysis goes exclusively to actual, i.e., current, not historical, indicia of interdependence. The existence or absence of formal connections between the University and the Clubs of the type demonstrated by the disputed stipulations 14-18 and 61 is thus immaterial to the analysis undertaken by the Division and, under the legal standards employed, no resolution of these disputes could affect the outcome of this litigation.

> STIPULATION # 19 provides that: The record herein indicates that an "interclub Agreement" exists between the "clubs" and Princeton University which at least in part intends to regulate the behavior of "club" members and their guests on the "clubs" premises.

The Inter-club Agreement is a document that was, at some point, proposed but never adopted as a way of setting standards for Club member conduct. This document was discussed at some length at the Conference. It is undisputed that although it was never adopted by the Clubs, the document somehow found its way into the possession of Princeton University authorities and was then excerpted in the Princeton University student handbook. *Rights Rules and Responsibilities* (1982 ed.). Counsel for Princeton admitted at the Conference that the inclusion of excerpts from the non-existent document was an error because no such agreement existed.

The following reference was made to the Inter-club Agreement in the Undisputed Facts section of the Division's Finding of Probable Cause:

> The pamphlet *Rights, Rules and Responsibilities,* is published by Princeton University and sets forth Princeton University's disciplinary rules and procedures governing student behavior. The 1982 pamphlet included a specific section entitled "Conduct at Prospect Street Clubs" [*Rights, Rules and Responsibilities* at 26]. The regulations in that section are said to be based on the Interclub Agreement. The section presents excerpts from the terms of the Interclub Agreement, an agreement which establishes a cooperative arrangement for discipline of undergraduate students who violate standards of conduct. The "standards of behavior at individual clubs are to conform with established standards in the University as a whole. In particular, club members are to act with considerate regard for the rights, privileges, and sensibilities of others. It is expected that they will show due consideration for the property of their fellow members and guests, as well as for the property of the club itself. Physical violence, intimidation of others, or offensive and disorderly behavior will not be tolerated, in any club, or on the walks and streets outside the clubs" [*Rights, Rules and Responsibilities* at 26].

This description seems erroneously to accept the fact in dispute: the existence of an Inter-club agreement. The next question is what effect that erroneous statement of fact had on the finding of jurisdiction.

The Director listed three factors central to the finding that the Clubs and the University are integrally related,

among them, that the Clubs "are held out as part of a Club system which services Princeton University students." The facts cited to support that factual conclusion relate solely to the fact that the "University publications present the clubs as a dining alternative for upperclass students. * * * [H]aving an eating club contract allows for an integration with the University dining facilities through the general meal exchange program." This factual conclusion therefore does not rely on facts tending to show that an Inter-club agreement regarding discipline was in effect.

The immateriality of the improper resolution of this disputed stipulation is reinforced by the reference made to it by the ALJ in his Initial Decision to grant a Partial Summary Decision on the issue of jurisdiction:

> Respondents allege the existence of a dispute with respect to the following: an alleged Inter-Club Agreement, the nature of the 'hat bid' procedure, and the use of club facilities by members of the public. The Director, however, has made clear in her Finding of Probable Cause that these matters were not significant in reaching her decision. Similarly, for purposes of the pending Motion any such dispute is irrelevant.

In summary, we find that stipulation #19, although improperly and erroneously resolved and repeated in the statement of facts of the Finding of Probable Cause, formed no material part of the Director's ultimate determination that jurisdiction existed, based on the relationship between the Clubs and the University, existed.

2. THE NEXT TEN STIPULATIONS WERE PROPOSED BY THE CLUBS STIPULATION # 58

> The record herein indicates that while each "club" devises its own rules for Bicker, these rules are influenced by Princeton University's rules and regulations.

The Finding of Probable Cause does not rely on this stipulation. The stipulation relates to the type of formalistic ties that formed no part of the finding of jurisdiction. The finding on jurisdiction is based on the symbiotic relationship that exists between the Clubs and the University. The University provides the students; the Clubs feed them. Formalistic discussion of rule derivations is immaterial to this analysis.

As previously mentioned, Stipulation # 61 is a historical fact, immaterial to the finding of jurisdiction.

> STIPULATION # 110 The record herein indicates that Princeton University assumes some oversight responsibilities with respect to the conduct of the members of the all-male clubs.

The discussion of this stipulation at the Conference was minimal. The stipulation is immaterial to the decision on jurisdiction, which was based on the functional interdependence of the Clubs and the University rather than questions of discipline. Moreover, the stipulation is correct and supported by other stipulations. During the discussion of the Inter-Club Agreement, counsel for Tiger agreed that a student who violated the Code of Conduct of Princeton would be subject to discipline by a joint committee, which includes the Dean of Student Affairs, no matter where the violation occurred. According to stipulation # 22, to which there is no opposition by the Clubs, Club officers have been disciplined by the University for Club members' behavior, although it is no longer

University policy to do so. According to undisputed stipulation # 133, Princeton disciplines students involved in off-campus altercations. Presumably, this includes altercations that occur at Clubs.

> STIPULATION # 111 The record herein indicates that the activities of the all-male clubs are conducted for the benefit of their members, not the public.

The only dispute over this stipulation was Frank's objection to the use of the word "public." The stipulation, as resolved, rejects Frank's theory and is generally favorable to the Clubs.

> STIPULATION # 112 The record herein indicates that the all-male clubs do not always limit the use of the facilities and services of their clubs to their members in good standing and their guests.

This stipulation appears to be true. There was undisputed testimony by Gordon K. Harrison, Club Manager for several clubs, including Tiger, that during the fall term, "sophomores are able to visit clubs to sample the meals . . . " when deciding what clubs to join even though they are not personally invited by a member. This indicates that the clubs do not always limit the use of their facilities to members and their guests. Beyond the veracity of this stipulation, however, is the issue of whether it is relevant.

This stipulation goes to the non-essential issue of whether the Clubs are places of public accommodation in their own right, and is irrelevant to the crucial determination that the Clubs are subject to the jurisdiction of the Division on Civil Rights because they had altered their

distinctly private nature by means of their connection with Princeton University.

Stipulations 118, 121, 122 and 127 were all resolved in the Club's favor. Disputed Stipulation is 171 irrelevant to the type of analysis employed by the Division and also is not really disputed.

> STIPULATION # 171 The record herein indicates that when Princeton snow-plows travel between University facilities located at the opposite ends of Prospect Avenue, they often clear the public right-of-way (sidewalks) in front of Ivy, Cottage, and Tiger Inn without the all-male clubs' permission.

The only dispute to which this stipulation seems to relate is whether the Clubs had ever request snow-plowing, or the degree of relationship between the Clubs and the University that is demonstrated by the plowing. In fact, there was documentary evidence indicating that a decision to plow in front of the Clubs was made by the University, specifically to help the Clubs during times of financial hardship. In addition, stipulation # 159, *proposed* by Tiger Inn and *accepted* by Frank, acknowledges that snow-plowing on Club property occurs and is not paid for by Tiger Inn. If the dispute over this stipulation was improperly resolved, it was resolved in the Clubs' favor in a way that accorded precisely with the testimony of the Club managers, called as witnesses for the Clubs. Moreover, this stipulation has nothing to do with the analysis employed by the Director in its Finding on jurisdiction.

III

The Clubs and Princeton, which is undisputably subject to LAD, have an integral relationship of mutual benefit. The relationship between the Clubs and Princeton can be derived entirely from the undisputed facts regarding the present functional interdependence between the Clubs and the University. There are no disputed facts material to the jurisdictional issue. Therefore, no plenary hearing was necessary before the Division properly asserted jurisdiction over the Clubs.

We also find that the undisputed facts establish that the Clubs and Princeton have an interdependent relationship that deprives the Clubs of private status and makes them subject to the Division's jurisdiction.

Gender discrimination is contrary to the legislative policy of the State of New Jersey. "The eradication of 'the cancer of discrimination' has long been one of our State's highest priorities." *Dixon v. Rutgers, The State University of N.J.*, 110 *N.J.* 432, 451, 541 *A.2d* 1046 (1988), quoting from *Fuchilla v. Layman*, 109 *N.J.* 319, 334, 537 *A.2d* 652 (1988). *See also Peper v. Princeton, supra*, 77 *N.J.* at 80, 389 *A.*2d 465. The Legislature enacted LAD to reflect the belief that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions of a free democratic state." *N.J.S.A.* 10:5-3. The elimination of discrimination in educational institutions is particularly critical. *Dixon v. Rutgers, The State University of N.J., supra*, 110 *N.J.* at 452-53, 541 *A.*2d 1046. The intent of the legislature to eliminate discrimination in educational institutions is evidenced by the designation in *N.J.S.A.* 10:5-5(*l*), as a "place of accommodation," of

any "college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey." *See also Hebard v. Basking Ridge Fire Company, supra,* 164 *N.J. Super.* 77, 395 *A.*2d 870; *Clover Hill Swimming Club v. Goldsboro,* 47 *N.J.* 25, 219 *A.*2d 161 (1966); *Nat. Org. for Women v. Little League Baseball,* 127 *N.J. Super.* 522, 318 *A.*2d 33 (App.Div.1974).

The Clubs have fiercely contested the threshold issue of jurisdiction because, once jurisdiction is established, there is no question that the Clubs discriminated against women. It is undisputed that the Clubs had a general policy that excluded females from consideration as members. It is also undisputed that the Clubs applied this policy to Frank when she attempted to bicker at the clubs. That policy constituted discrimination in violation of LAD. On the basis of the facts in this record, we agree with the Division that the Clubs cannot sever their ties to the University or remove themselves from the jurisdiction of the Division. Instead, the Clubs must obey this State's substantive legal proscriptions against discrimination and discontinue their practice of excluding women purely on the basis of gender.

We reverse the Appellate Division and reinstate the Order of the Division on Civil Rights dated May 26, 1987.

CLIFFORD and O'HERN, JJ., concurring in judgment.

We agree with the Court's ultimate conclusions that (1) there was no necessity for the Division on Civil Rights to have conducted a plenary hearing before exercising jurisdiction over the all-male eating clubs, (2) the eating clubs' special relationship with Princeton University

deprived those clubs of exempt status as "distinctly private" social organizations under this State's statutory law guaranteeing civil rights, *N.J.S.A.* 10:5-1 to -42, and (3) the clubs' by-laws and policies against admission of women violated this State's substantive law. We therefore concur in the judgment.

Concurring in result – Justices CLIFFORD and O'HERN.

For reversal and reinstatement – Chief Justice WILENTZ, and Justices CLIFFORD, HANDLER, POLLOCK O'HERN, GARIBALDI and STEIN – 7.

For affirmance – None.

APPENDIX F

Finding of Probable Cause of the New Jersey Division on Civil Rights

(Filed May 14, 1985)

STATE OF NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY DIVISION ON CIVIL RIGHTS

DOCKET NO: PL 05-1678, PL 05-1679, PL 05-1680

SALLY FRANK,

Complainant,

v.

IVY CLUB, UNIVERSITY COTTAGE CLUB, TIGER INN and TRUSTEES OF PRINCETON UNIVERSITY,

Respondents.

Whereas on December 19, 1979, Complainant, Sally Frank, filed Verified Complaints in the above captioned matter and after an extensive investigation by the Division on Civil Rights, the Division makes the following findings:

I. JURISDICTION

A. PROCEDURAL HISTORY

In December of 1979, Ms. Frank filed a Verified Complaint against Ivy Club, Tiger Inn and the University Cottage Club as well as Princeton University alleging discrimination based on sex in a place of public accommodation in violation of *N.J.S.A.* 10:5-12(f). Respondent Clubs responded to the Complaint by denying that the clubs were places of public accommodation. The three clubs also asserted that their members' freedom of association rights would be violated if the Complainant was granted the requested relief. In answer to the Complaint, Princeton University denied that the University was a place of public accommodation. Princeton University also claimed the University had committed no discriminatory acts.

On December 9, 1981, after an investigation of the allegations, the Division on Civil Rights (hereinafter "Division") dismissed the complaint against the Respondent Clubs finding that the Clubs were exempt from the public accommodations provisions of the New Jersey Law Against Discrimination (hereinafter "L.A.D.") because the Clubs were "in their nature distinctly private." Pursuant to *N.J.S.A.* 10:5-5(l), the Division also found no probable cause to credit the allegations of discrimination filed against Princeton University.

Ms. Frank appealed the decision of the Division. On August 1, 1983, the Appellate Division, while taking no position on the merits of the complaint, vacated the

decision by the Division and remanded the case for further investigation.*

On remand from the Appellate Division, the Division on Civil Rights engaged in an extensive investigation. Voluminous documentation was submitted by the parties. Two days of fact-finding hearings were held and witnesses appeared to present evidence. The parties reached agreement on approximately two hundred stipulations. All parties were given the opportunity to submit briefs and reply briefs on the issues involved.

After careful consideration of all the evidence presented, the Division finds that the Respondent Clubs are subject to the jurisdiction of the Division on Civil Rights. Despite their separate legal identities, the Clubs' close affiliation with Princeton University and the function the Clubs discharge for the University, leads the Division to conclude that the Clubs are not "in [their] nature distinctly private."

B. UNDISPUTED FACTS**

Princeton University is a private, non-sectarian institution of Higher Education, founded in 1746. [RS1]*. The

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* While the Appellate Division took no position on the merits, its decision clearly suggested the need to reconsider the Division's original conclusion in light of further fact-finding ordered by the Appellate Division.

** Facts are drawn from stipulations submitted by the parties and agreed to by them, and from documents submitted by the parties. Authenticity of the documents is not in dispute.

* RS refers to stipulations initially submitted by Respondents, as agreed to by all parties.

University is located in Princeton, New Jersey [CS2]**. From 1746 to 1968, Princeton University admitted only male students as undergraduates [RS3]. In 1969, the University admitted women as undergraduate degree candidates for the first time [RS24].

Princeton University, from approximately 1803 to 1843, required all undergraduate students to take their meals in commons operated by the college steward [RS4]. In 1843, Princeton University undergraduate students, for the first time, were permitted to board off-campus [RS5]. The Princeton college refectory burned down in 1856 and was closed for fifty years. During that time, all students took their meals in boarding houses that were not affiliated with the college [RS6]. In the mid-1800's several groups of Princeton Students formed "select associations" to reduce the cost of their off-campus living and dining expenses [RS7]. By 1876 twenty five "select associations" or eating clubs were in existence [RS8].

The club system associated with Princeton University, which began with these "select associations", presently consists of thirteen clubs, eight non-selective clubs and five selective clubs. [RS28, 29]. Campus, Charter, Cloister Inn, Colonial, Dial Lodge, Elm, Quadrangle and Terrace are the eight non-selective clubs. These clubs, formerly all male and selective, are now co-ed [RS28]. The non-selective clubs offer social, recreational and dining activities [RS36].

** CS refers to stipulations initially submitted by complainant, as agreed to by all parties.

Admission to the non-selective or open clubs is by a lottery system [RS37].* Students who are not accepted into the "open club" of their choice are given the opportunity to go through subsequent lottery rounds at any "open club" which has additional available contracts to offer. [RS38].

The five selective clubs are Ivy, Cottage, Tiger Inn, Cap & Gown and Tower [RS29]. The selective clubs also offer social, recreation and dining activities [RS36]. Tower and Cap & Gown accept male and female members [RS29]. From their inception until 1984, all members of Ivy, Cottage Club and Tiger Inn have been male. [RS31].

Membership in the selective clubs is by invitation only [RS30]. Bicker is the term for the process used by the five selective clubs for interviewing and selecting new members [RS53]. Bicker was at one time administered by the sophomore class; this practice, however, ceased in 1978 [RS67]. Since 1978, the sophomore class has not provided direct funding for the Bicker process [RS67]. The process is now totally funded by the individual clubs [RS63].

Since at least 1977, there has been a fall and spring bicker [RS54]. Spring bicker has taken place in late January to early February [RS54]. Fall bicker is an optional activity for selective clubs and is usually restricted to seniors [RS56]. Two purposes of fall bicker are to fill

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* In addition to the lottery, since 1979, the Quadrangle Club requires each student seeking admission to collect the signature of 15 members of the Club during a 3-week period prior to open club sign ups [RS37].

section sizes to their optimal level and provide new members with an introduction to the bicker process [RS57]. Fall bicker is administered entirely by the clubs [Ivy/Cottage (I/C) Appendix at 70, Burchenal Certification; I/C Appendix at 117, Fricke Certification; Tiger Appendix at 149, Rheinhart Deposition].

Spring bicker is presently coordinated by the Committee on Bicker Administration (C.B.A.). In 1982-83, the C.B.A. had eight members: the bicker representative from each of the selective clubs; the C.B.A. chairman, who was a sophomore selected by the five club representatives; and the C.B.A. chairmen from the previous two years. In 1983-84, the C.B.A. chairman was selected by a committee consisting of the representative from each of the selective clubs plus last year's C.B.A. chairman; the new chairman then selected six or seven fellow sophomores (both male and female) to constitute this year's C.B.A. [RS64].

The committee that coordinates the spring club selection used without charge, for an unknown period of time prior to 1982, a University office during the week of the selection process from which it administered the process and answered student questions. Since that time, the University has charged rent for the use of such office space. For spring bicker in 1984, the committee chairman used his own dormitory room [CS36].

The rules for bicker change from time to time [RS62]. The major steps in the process include (1) registration; (2) bicker sessions; (3) bid sessions, and (4) sign in [RS71]. Registration for spring bicker, from 1977 to 1980, took place in the Dean of Student Affairs Office. Since 1980, spring bicker registration has taken place at the Tower

Club [RS72-73]. Registration consisted of picking up a form, filling it out, and dropping it in a cardboard box [CS31]. Since 1979, the bicker form was provided by the C.B.A.

Bicker sessions, since at least 1977, consist of visits made by the bickerees to each of the selective clubs [RS74]. Bicker sessions are held every night during bicker [RS79]. Two of the purposes of bicker sessions are to give bickerees a glimpse of life at the clubs and to give club members the opportunity to individually evaluate the bickerees as prospective club members [RS78].

The C.B.A. presently devises a standard schedule and attendance rules for bicker sessions. Ivy and Cottage Club set their own attendance rules, usually in conformity with the agreement reached with the C.B.A. [RS75]. Since at least 1977, bicker sessions usually take place on the Sunday, Monday and Tuesday of bicker week with an afternoon makeup session on Wednesday [RS77]. If a bickeree misses a session without an excuse accepted by the C.B.A., he or she will automatically be cut from the club's list and will be ineligible to join the club [RS80]. Prior to 1983, the committee that coordinated spring bicker ensured that, as per the clubs directions, women bickerees received interview appointments only at the coed selective clubs while men could receive appointments at all selective clubs [CS34].

For a period of time prior to 1983, every man who went through the application process for membership in a selective club and attended every bicker session at each of the selective clubs was guaranteed an opportunity to join at least one selective club. A man not otherwise

selected was offered the opportunity to join a selective club which was picked at random by the clubs.* This was called getting a hat bid [CS23]. The hat bid system was abolished in 1983 [CS23]. A woman was not eligible for a hat bid when the hat bids were in existence [CS24].

A bid session is a meeting of the club members to decide which bickerees will be invited to join a selective eating club [RS85]. A bid is an invitation to join one of the selective clubs [RS84]. There is not a set number of bids that each club is required to offer [RS87], and the process whereby bickerees will be extended invitations to join varies from club to club [RS82]. Since at least 1977, after each bicker session, members of Tiger Inn, Cottage and Ivy submit written comments to their bicker chairman about each bickeree with whom they had significant contact. These confidential comments are read at bid sessions [RS83].

Undergraduate members of Ivy are elected by consensus at a meeting of a majority of its current membership [RS89]. Tiger Inn requires unanimous agreement of their undergraduate members for a sophomore to be admitted [RS90]. Cap & Gown, Cottage and Tower require a 2/3 majority vote of their memberships for a sophomore to be admitted [RS88]. In 1984, 114 sophomores completed bicker at Ivy, 40 received bids and 39

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* According to the Certification of Christie Quick, 1981-82 Chairman of Committee on Bicker Administration, the selective clubs would meet to determine which club would offer a hat bid to an eligible student. During the 1982 spring bicker, one person was eligible for a hat bid. The club chosen to offer the bid was selected by a roll of dice. [I/C App. at 172-73].

bids were accepted [RS59]. At Cottage Club, 107 sophomores completed bicker, 72 received bids and 69 bids were accepted [RS94]. At Tiger Inn, 112 sophomores completed bicker, 91 received bids and 70 bids were accepted [RS139]. Cap & Gown had 114 sophomores who completed bicker, 85 received bids and 70 bids were accepted [RS97]. At Tower, 106 sophomores completed bicker, 71 received bids and 69 bids were accepted [RS98].

Once a bickeree has been given a bid and has decided to join a particular club, each club has its own traditional rites for initiating new members [RS101]. New members of the selective clubs traditionally sign in at a ceremony held after bicker [RS102].

Ivy, Tiger Inn and Cottage Club, the three all-male selective clubs, are the Respondents in this action along with Princeton University [Verified Complaint of Sally Frank, 12/19/79]. The Ivy Club was founded in 1879 and filed a Certificate of Incorporation on April 26, 1883 pursuant to an act of the legislature of the State of New Jersey entitled "An Act to Incorporate Societies for Social, Intellectual and Recreation Purposes" [RS9]. Ivy Club's first clubhouse was in Ivy Hall, located at Mercer Street, in Princeton. Ivy Hall was privately owned by Mrs. John R. Thompson, and rented to Club members at a nominal rent beginning in 1877, and continuing until Ivy erected a new clubhouse in 1884 [RS16]. In 1883 Ivy purchased a lot on Prospect Street from Mrs. Mary Olden and erected a frame clubhouse in 1884. No known direct financial assistance was received from Princeton University [RS17].

In 1887, Ivy contracted a New York architect to design an extension to its clubhouse. Ivy raised funds for

this project by private subscription and without any known direct financial assistance from the University [RS18]. In the late 1890's, Ivy purchased its present land on Prospect Street for $13,000 from H.B. Fine to erect its present clubhouse. Proceeds from the sale of the old clubhouse and its land helped finance the purchase of new land and the building campaign. All funds were raised from the membership by subscription without any known direct financial assistance from Princeton University [RS19].

Title to the land and property located at 43 Prospect Street in Princeton, New Jersey is solely in the name of Ivy Club [RS164]. The Ivy Club pays all local and state taxes on assessed real estate of which it is the sole owner located at 43 Prospect Street, Princeton, New Jersey [RS163]. The Ivy Club pays all maintenance and insurance costs for the property located at 43 Prospect Street, Princeton, New Jersey. Princeton University sometimes plows the snow from the public right-of-way in front of the Ivy Club [RS165]. No snow plowing, ground maintenance or other work is done by Princeton University on any other part of Ivy's grounds or facilities [RS172]. The Ivy Club maintains an account with, and is directly billed by the Public Service Electric & Gas Co., Elizabethtown Water and New Jersey Bell [RS168].

The United States Treasury Department granted Ivy Club tax-exempt status under Section 101(9) of the Internal Revenue Code on October 19, 1942 [RS144]. Since at least 1969, Ivy Club has claimed and presently claims tax-exempt status under Section 501(c) (7) of the Tax Reform Act of 1969 which reaffirmed the exempt status of social clubs organized on a not-for-profit basis [RS146]. Ivy

Club has filed Forms 990-T and 990 Federal income tax return for each year from at least 1977 to date [RS149].

From November 1978 to April 1983, Ivy possessed a club liquor license. The license was issued by the Mayor and Council of the Borough of Princeton. Ivy applied for its club license pursuant to the rules and regulations promulgated by the New Jersey Alcoholic Beverage Commission and, in particular, *N.J.A.C.* 13:2-8. Since April 1983, Ivy has not possessed nor has it applied for, a liquor license [CS13a].

Pursuant to the constitution and by-laws of the Ivy Club, the Board of Governors of the Ivy Club has general supervisory powers over the affairs and property of the club [RS124]. The Board of Governors of the Ivy Club is comprised of 18 members; 15 are elected for five-year terms on a staggered basis; one (the undergraduate governor) is elected for a one-year team and two are elected for two-year terms [RS127].

Ivy Club's Constitution authorizes three classes of membership: honorary, graduate and undergraduate [RS191]. The undergraduate membership of the Club consists of three Sections, members in the Senior Class, members in the Junior Class and members elected from the Sophomore Class. Every undergraduate member of the Club in good standing, upon his graduation from the University or upon his leaving the University before graduation, becomes a Graduate member of the Club. A person who attended Princeton University for at least one academic semester and any person who resigned from Undergraduate membership may be elected a Graduate member. Honorary members are residents of the County

of Mercer, in the State of New Jersey elected by at least two-thirds of the undergraduate members, and approved by the Board of Governors. Honorary members remain so for life or until such time as they may resign from such membership. [Ivy Club Constitution].

As of 1984, Ivy Club had 1,500 graduate members, 79 undergraduate members and 39 sophomores who accepted bids [I/C Appendix at 73, Burchenal Certification]. Ivy's Constitution does not require that the clubs' membership be restricted to men [RS186]. The issue of admitting women has never been put to a formal vote of the undergraduate members of Ivy but the general consensus of the Club is that women should not be extended membership [RS188].

The Tiger Inn was founded in 1890 and filed a certificate of incorporation on February 9, 1892 pursuant to an act of the legislature of the State of New Jersey entitled "An Act to Incorporate Societies for Social, Intellectual and Recreational Purposes" [RS11]. Tiger Inn's first clubhouse was located in a private home on William Street which the club members rented with their own funds for $300 in 1890 [RS12].

In 1894, Tiger purchased the land and realty located at University Place on Prospect Avenue from a private individual without any known direct financial assistance from Princeton University. A deed of the transaction is registered in the County Clerk's Office in Trenton, dated April 20, 1884 [RS13]. Tiger Inn built its present clubhouse located at 48 Prospect Avenue, Princeton, New Jersey, in 1895 without any known direct financial assistance from Princeton University [RS14]. Trenton Trust

and Safe Deposit Company held the mortgage on Tiger Inn's present clubhouse [RS15].

Title to the land and property located at 48 Prospect Street in Princeton, New Jersey is solely in the name of the Tiger Inn [RS158]. The Tiger Inn pays all local and state taxes assessed on real estate of which it is the sole owner located at 48 Prospect Street, Princeton, New Jersey [RS157]. Tiger Inn pays all maintenance and insurance costs for the property located at 48 Prospect Street, Princeton, New Jersey. Princeton University sometimes plows the snow from the public right-of-way in front of Tiger Inn [RS159]. No snow plowing, ground maintenance or other work is done by Princeton University on any other part of Tiger Inn's grounds or facilities [RS172]. The Tiger Inn maintains an account with, and is directly billed by the Public Service Electric & Gas Co., Elizabethtown Water and New Jersey Bell [RS166].

The United States Treasury Department granted Tiger Inn Federal tax-exempt status under Section 101 (9) of the Internal Revenue Code in an authorization dated September 1, 1942 [RS142]. Since 1969, Tiger Inn has claimed and presently claims tax-exempt status under Section 501(c)(7) of the Tax Reform Act of 1969 which reaffirmed the exempt status of social clubs organized on a not-for-profit basis [RS145]. Tiger Inn has filed Forms 990-T and 990 Federal income tax return for each year from 1968 to date [RS148].

From September 1977 to April 1983, Tiger Inn possessed a club liquor license. The license was issued by the Mayor and Council of the Borough of Princeton. Tiger Inn applied for its club license pursuant to the rules and

regulations promulgated by the New Jersey Alcoholic Beverage Commission and, in particular, *N.J.A.C.* 13:2-8. Since April 1983, Tiger has not possessed, nor has it applied for, a liquor license [CS13b].

Pursuant to the constitution and by-laws of Tiger Inn, the Board of Governors of Tiger Inn has general supervisory powers over the affairs and property of the club [RS123]. The Board of Governors of Tiger Inn consists of 12 of the graduate members of the Club, all of whom are elected to a term of three years [RS129]. Tiger Inn's Constitution authorizes four types of membership: Active, Graduate, Associate and Honorary [RS189]. The Active members of the Club are members of the Senior and Junior Classes of Princeton University and "special students rated therewith." The Graduate membership of the Club consists of all Alumni of Princeton University, who were regular Active members of The Tiger Inn at the time when they were graduated or left college. Honorary Membership of the Club consists of persons of prominence, members of the Faculty and of the Board of Trustees, who are elected to Honorary Membership. Associate members consist of all persons not covered in the preceding three classes of membership. They may be graduates, men who left college before graduating, or non-Princeton men [Tiger Inn Constitution]. Tiger Inn's Constitution does not require that the clubs' membership be restricted to men [RS186]. From time to time, however, the undergraduate members of the Tiger Inn have held informal votes on whether to admit females into the Club. In each case the overwhelming majority voted against permitting women to become members [RS187].

The University Cottage Club was founded in 1886 and filed a Certificate of Incorporation on December 10, 1889 pursuant to an act of the legislature of the State of New Jersey entitled "An Act to Incorporate Societies for Social, Intellectual and Recreational Purposes" [RS10]. Cottage Club's first clubhouse was a small wooden house on Railroad Avenue, (now University Place) Princeton, which the members leased starting in 1886 [RS20].

On or about 1892, Cottage purchased its present lot situated on Prospect Street, Princeton, New Jersey and erected a clubhouse [RS21]. In 1904-1905, Cottage Club's present clubhouse was financed from private, non-University funds [RS22]. Cottage Club received no known direct financial assistance from Princeton University for the leasing or construction of any of its clubhouses [RS23].

Title to the land and property located at 51 Prospect Street in Princeton, New Jersey is solely in the name of the Cottage Club [RS161]. Cottage Club pays all local and state taxes assessed on real estate of which it is the sole owner located at 51 Prospect Street, Princeton, New Jersey [RS160]. Cottage pays for all maintenance and insurance costs for the property located at 51 Prospect Street, Princeton, New Jersey. Princeton University sometimes plows the snow from the public right-of-way in front of Cottage Club [RS162]. No snow plowing, ground maintenance or other work is done by Princeton University on any other part of Cottage Club's grounds or facilities [RS172]. The Cottage Club maintains an account with, and is directly billed by the Public Service Electric & Gas Co., Elizabethtown Water and New Jersey Bell [RS167].

The United States Treasury Department granted Cottage Club tax-exempt status under Section 101(9) of the Internal Revenue Code in an authorization dated September, 1982 [RS143]. Since at least 1969, Cottage Club has claimed and presently claims tax-exempt status under Section 501(c) (7) of the Tax Reform Act of 1969 which reaffirmed the exempt status of social clubs organized on a not-for-profit basis [RS147]. Cottage Club has filed Forms 990-T and 990 Federal income tax return for each year from 1977 to date [RS150].

From September 1977 to June 1981, Cottage possessed a club liquor license. The license was issued by the Mayor and Council of the Borough of Princeton. Cottage applied for its club license pursuant to the rules and regulations promulgated by the New Jersey Alcoholic Beverage Commission and, in particular, *N.J.A.C.* 13:2-8. Since June 1981, Cottage has not possessed, nor has it applied for, a liquor license [CS13c].

Pursuant to the constitution and by-laws of the Cottage Club, the Board of Governors of the Cottage Club has general supervisory powers over the affairs and property of the club [RS125]. The Board of Governors of the Cottage Club is composed of 25 members who hold office for a three year term. It is comprised of: the President, Vice-President, and Financial Secretary of the Club - who now serve *ex-officio*; 22 graduate or associate members of whom at least 14 must be graduate members [RS128].

Cottage Club's Constitution authorizes six classes of membership: Active, Graduate, Inactive, Associate, Honorary and Faculty [RS190]. Any regular or special

member of the Sophomore, Junior or Senior Class of Princeton University in good standing is eligible to be elected as an Active member. Every one who has been an Active member shall, upon graduation of his class from Princeton University, become a Graduate member unless he remains an Active member by continuing as a resident member of Princeton University and designating his desire to remain active with the Secretary.* Any Active member who leaves Princeton University prior to the graduation of his class, shall upon severing his connection with the University, become an Inactive member. Any person who was a Resident member of Princeton University and whose class has graduated is eligible to election as an Associate member. Members of the Faculty of Princeton University, whether Graduates of the University or not, shall be eligible to election as Faculty members. "Any distinguished gentlemen who have not been Resident members of Princeton University shall be eligible to election as Honorary members" [Cottage Club Constitution].

As of 1984, Cottage Club had 2,110 graduate members, 128 undergraduate members and 68 sophomores who had accepted bids [I/C Appendix at 119, Fricke Certification]. Cottage Club's Constitution does not require that the clubs' membership be restricted to men [RS186]. From time to time, the undergraduate members

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* "The term 'Resident member of Princeton University' embraces every person who shall have been matriculated in said University or its predecessor 'The College of New Jersey' as a regular or special undergraduate student." [Cottage Club Constitution].

of the Cottage have held informal votes on whether to admit females into the Club. In each case, the overwhelming majority voted against permitting women to become members [RS187].

The general public is not invited to join Tiger Inn, Cottage or Ivy [RS108]. Tiger Inn, Ivy and Cottage each require their undergraduate members to pay an initiation fee together with a yearly fee for board and social activities. All fees are paid by the student directly to the clubs [RS138]. These fees are not part of Princeton University's undergraduate tuition [RS139].* Membership dues and contributions to Ivy, Cottage, and Tiger Inn are not tax deductible as contributions to educational institutions [RS154]. Respondent Clubs provide food for consumption on their premises by contract with club members in which the club agrees to provide specific meals to their members for specific sums. Club members who bring a

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* Financial aid awards by Princeton University are made directly to the students, not to the Clubs [RS140]. The University's office of Undergraduate Financial Aid initially calculates financial aid on the basis of a standard budget which includes a board rate based upon a University twenty meal contract and a standard allowance for books and other personal expenses. An undergraduate student receiving financial aid may receive additional funds in the form of a loan to cover the added cost of a club meal contract. [Answer to Verified Complaint by Respondent, Trustees of Princeton University dated January 29, 1980 at p.8]. In the 1982-83 academic year, 39 students had budget increases relating to club membership, totalling $19,740. In 1983-84 academic year, 66 students had club related increases, totalling $37,243. Increases in financial aid are also available for other educational expenses such as additional books, senior thesis research, and study abroad [Memo from Don M. Betterton of 1/20/84].

guest to dinner will be charged by the Club for the guest's meal unless the guest holds a University dining contract and both the club member and the guest utilize the Meal Exchange Program [CS12]. Graduate members may eat at the clubs on a per meal basis whenever they desire [I/C Appendix at 69, Burchenal Certification; I/C Appendix at 116, Fricke Certification]. Alcoholic beverages are served at times at the clubs to club members and their guests [CS13d]. Each of the Respondent Clubs has a library which is for the exclusive use of club members and their guests [CS37].

Respondent Clubs at times have paid for and placed announcements in *The Daily Princetonian* similar to those attached in Appendix A which advertise bicker, open house events and parties [CS10]. Some are addressed specifically to sophmores [sic] while others are a more general invitation to Princeton University students [Appendix A]. The clubs also are rented out from time to time to club members or their relatives for private non-club functions which are attended by non-members [Transcript of April 3, 1984 at 26-31, Testimony of Reed].

Tiger Inn, Ivy and Cottage are managed by stewards who are not employees of or students at Princeton University [RS179]. Persons whose services are retained by Tiger Inn, Ivy, and Cottage are employees of the Clubs and not Princeton University [RS176]. The Respondent Clubs contribute to Social Security for their employees, and pay them a weekly salary [RS178]. Ivy, Cottage and Tiger Inn each have their own IRS Employer Identification Number distinct from Princeton University's Employer Identification Number [RS152]. Employees of the clubs are not covered by University-provided benefits

such as health insurance, pension plans, Social Security contributions, etc. [RS177].

Ivy, Cottage and Tiger Inn use zip code 08540. The zip code 08544 is only used by Princeton University [RS183]. Respondent clubs do not have campus mail delivery, [RS184], nor can they use Princeton University's non-profit mailing permit [RS185].

Princeton University requires all freshman and sophomore students to have University dining contracts [RS40]. Upperclass students are given a wider choice of dining options [Student Guide to Princeton 1978-79]. These options include a University contract, independence and eating clubs [*Id.*]*. Students are in part informed of these options through various Princeton University publications [*Id.* See also "Choices"; "Princeton University Admissions Information";, "Princeton University Profile"].

Sophomore students, from at least 1977 until 1981, received "Choices", a booklet published by a committee of the Sophomore Class, the Upperclass Choice Committee, using class dues.* This booklet is distributed to all

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* Upperclass students who choose not to hold a meal contract at any facility are designated "independents." Under this option students make their own dining arrangements. Independents may choose to join a co-op at Two Dickinson or Brown Hall, where students share cooking and shopping responsibilities [Princeton University Admissions Information, 1979-80 at 30].

* The Upperclass Choice Committee is created each year by the Sophomore Class to apprise sophomores of the dining options available to them for their upperclass years. It is funded by the

(Continued on following page)

sophomores to help them decide which dining, residential and social options to select. For an uncertain period of time prior to 1978, the Dean of Student Affairs Office contributed to "Choices" financial support. After 1978, the booklet has been funded entirely by Sophomore Class dues [CS26]. Presently, the Upperclass Choice Committee publishes "Princeton's Guide to Academics and Social Life" a booklet which provides information on the academic majors, dining options and residential arrangements available to the junior and senior students [CS26].

Princeton University juniors and seniors generally dine in one of the following ways (figures are for 1983-84): DS (dining service) contracts (191); club membership (1570); living off-campus (98); living in Spelman Hall, apartment-style with kitchens (156); living at 2 Dickinson Street and participating in the co-op there (20); and living in other upperclass residential halls and eating

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(Continued from previous page)

Sophomore Class. The Sophomore Class' source of funds for expenses is class dues. The level of class dues is determined by the Office of the Dean of Students, in consultation with students. The University includes class dues in the overall bill students receive on a quarterly basis. The dues are collected by the University and turned over to the Sophomore Class on a quarterly basis. The Sophomore Class maintains these funds partially in a non-interest-bearing University account and partially in its own checking account (statements concerning which are returned to the University Controller's Office). With the approval of the Office of the Dean of Students, a student may elect not to pay class dues [Letter dated May 16, 1980 from Laura C. Ford to Susan L. Reisner, Appendix to Appellate Brief of Sally Frank at 42].

in an undetermined manner (194) [RS50]. Adlai Stevenson Hall is a University-operated facility consisting of two buildings at 83 and 91 Prospect Street. It was originally founded in 1970 after the University purchased the facilities of Court and Key & Seal Clubs, both now defunct [R39].* Any junior or senior may hold a meal contract at Stevenson Hall. In addition, a limited number of juniors and seniors may hold a meal contract at each of the residential colleges. Some of these are "Resident Advisors" (RA's), appointed to counsel freshmen and sophomores. Others are selected through a "college lottery" system, under which a small number of upperclassmen are allowed to continue to reside in the residential college where they resided as underclassmen. The numbers for 1983-84 are as follows:

Butler	19	(including 12 RAs)
Mathey	23	(including 13 RAs)
PIC	33	(including 10 RAs)

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* Stevenson Hall charges its members a social fee and sponsors a wide range of activities; it has two dining halls, one is strictly kosher [RS41]. With the exception of freshman and sophomores desiring a kosher meal contract, Stevenson Hall meal contracts are presently (1984) only available to juniors and seniors [RS42]. In 1983-84, 75 students have meal contracts for the non-kosher dining facility of Stevenson Hall at 91 Prospect Street [RS43]. In 1983-84 the regular (non-kosher) dining facility at Stevenson Hall can accommodate approximately 150 meal contractholders [RS44]. Unlike club employees, all employees of Stevenson Hall are employees of Princeton University and are eligible for University benefits [RS45]. University proctors are responsible for the security at Stevenson Hall and patrol the grounds there on a regular basis [RS47].

Rockefeller	18	(including 13 RAs)
Wilson	29	(including 12 RAs) [RS50]

The Princeton University Department of Food Services has no figures concerning "maximum capacity" for their dining facilities. They were able to provide the seating capacity for each facility, as set forth below. Of course, each seat could be used multiple times during a single meal period.*

Butler	180	
Mathey	249	
PIC	240	
Rockefeller	268	
Wilson	258	
83 Stevenson	80	(kosher)
91 Stevenson	99	(kosher) [RS49]

Twenty dormitories contain kitchens for use by students who cook for themselves. Of these, eleven are located in upperclass areas. Eight are "full kitchens" and three are snack kitchens [RS52].

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* According to a memo from Joan S. Girgus dated February 22, 1982, the preferrable ratio of spaces to students would be 3:5 although food consultants had suggested that 1:2 would be managable [sic] [Memo from Joan S. Girgus to Ad-Hoc Advisory Group on College Membership, February 22, 1982]. In 1983-84 academic year, 2856 students had University dining facility meal contracts. [Tennyson Affidavit at 1]. Princeton University had a total enrollment of 4524 students that year [I/C App. at 176].

The club system has consistently been the most popular eating option available to upperclass students [Choices, 1982 at 34]. In school year 1983-84, 1570 out of 2230 of Princeton's juniors and seniors ate at one of the following clubs: Campus, Cap & Gown, Charter, Cloister, Colonial, Dial, Elm, Ivy, Quadrangle, Terrace, Tiger Inn, Tower, University Cottage [CS27].

Three meal exchange programs exist between the University food services and Respondent Clubs.** [Answer to Verified Complaint by Respondent, Trustees of Princeton University p.4, dated January 29, 1980]. The general Meal Exchange Program allows students to dine with their friends at other facilities at no additional cost. The Program is administered, and all costs are jointly shared by the Inter-club Council and the University's Department of Food Services [*Id.*]. The general Meal Exchange Program works as follows: If a club member invites a Princeton student having a University dining contract to a meal at his club as his guest, and the guest reciprocates and invites the club member to dinner at a University dining facility within one calendar month, neither party will be charged for the guest's meal. If no reciprocal meal is exchanged within one month, the sponsor will be charged for the guest's meal by his club or the University [RS115]. Brown Co-op and 2 Dickinson are specifically excluded from this program [I/C App. at 74].

** These meal exchange programs are available with all the open and selective clubs. No meal exchanges are possible for students without Club or University contracts – i.e. independents [Transcript at 133, March 12, 1984, Testimony of Rigger].

The Upperclass Choice Meal Exchange provides sophomore class members with the opportunity to eat in facilities they may select for their junior year without the expenditure of additional funds. The meal exchange operates during the fall from the first Monday of November through the first Thursday in December. The precise dates are established mutually by the Upper Class Choice Committee and the University Department of Food Services. (The dates for 1983 were November 7 through December 1). The program requires that reservations be made through a meal exchange hot line which may be called during hours established by phone only and not in person. Reservations must be made 48 hours in advance with reservations for Monday meals e n [sic] made on Thursday [CS32, Appendix C].

The program is for dinner meals, typically Monday through Thursday. Each dining option facility may limit the number of openings and evenings available. These numbers and day limitations are listed and made available to Sophomore Class members. The UCC advises all Sophomores through the "Daily Princetonian" and by individual letter. Brown Co-op and 2 Dickinson are specifically excluded from the transfer of University DFS Funds [Id.].

Records are maintained by the Upperclass Choice Committee. These records indicate student names, student social security numbers, date and meal eaten, and the facility where the meal was taken. Tallies are collected daily and deposited at the Department of Food Services, 106 Alexander Street. Individual diners present meal cards at the facility they are visiting. The Sophomore Class supplies to the Department of Food Services the

records maintained by the Upperclass Choice Committee. The Department of Food Services then reimburses the individual clubs per dinner meal for contract holders who participate in the program. The cost for the academic year 1983 was $1.90 [Id.]. Under this program, "[d]ue to limited space, girls cannot eat at all male eating clubs" ["Choices," 1979 at 33].

The Sophomore Club Meal Participation Program allows sophomores who are new club members to dine at a club during the spring semester of their sophomore year. [Answer to Verified Complaint by Respondent, The Trustees of Princeton University p.4, dated January 29, 1980]. The University reimburses the club a percentage of the University food costs for the meal [Transcript at 175, Mar. 12, 1984, Testimony of Harrison]. At Ivy, the sophomore member is charged the difference between the University's reimbursement and the club's charge for the meal [Transcript at 52, April 3, 1984, Testimony of O'Malley].

The pamphlet *Rights, Rules and Responsibilities,* is published by Princeton University and sets forth Princeton University's disciplinary rules and procedures governing student behavior [CS8]. The 1982 pamphlet included a specific section entitled "Conduct at Prospect Street Clubs" [*Rights, Rules and Responsibilities* at 26]. The regulations in that section are said to be based on the Interclub Agreement. The section presents excerpts from the terms of the Interclub Agreement, an agreement which establishes a cooperative arrangement for discipline of undergraduate students who violate standards of conduct. The

> standards of behavior at individual clubs are to conform with established standards in the University as a whole. In particular, club members are to act with considerate regard for the rights, privileges, and sensibilities of others. It is expected that they will show due consideration for the property of their fellow members and guests, as well as for the property of the club itself. Physical violence, intimidation of others, or offensive and disorderly behavior will not be tolerated, in any club, or on the walks and streets outside the clubs [*Rights, Rules and Responsibilities* at 26].

University proctors are not responsible for the security at Tiger Inn, Cottage or Ivy and do not regularly patrol the clubs' grounds or premises [RS48]. Princeton University students involved in off-campus altercations are subject to discipline by the University [RS133].* Princeton University has no authority to discipline a graduate member of Tiger Inn, Ivy or Cottage for objectionable conduct by that graduate member on the Club's premises [RS135]. Tiger Inn, Cottage and Ivy discipline their own members for disturbances connected with the Clubs regardless of whether any action was taken by public or University authorities [RS132].

On two occasions since 1977, club officers have been disciplined by Princeton University for the conduct of

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* Between the years 1977 through 1984, 52 incidents for which disciplinary sanctions were imposed occurred off-campus. Of those, eleven occurred on club grounds. In these 52 incidents, 62 students were penalized, 16 of these students were penalized for incidents on club grounds [CS21, Appendix B, page 3].

their members in the club or at club functions; one of those instances involved one of the three defendant clubs in the instant proceeding. It is no longer the University's policy to discipline club officers' *ex officio* for the conduct of club members [CS22].

From at least 1977, Tiger Inn, Ivy and Cottage have not been listed as officially recognized student organizations by the Dean of Students of Princeton University [RS109]. Princeton University does not presently provide any assistance to Tiger Inn, Ivy and Cottage in their fundraising efforts [RS180]. However, the Princeton University Alumni Records and Mailing Services ("ARMS") makes certain services available to University alumni, including supplying updated mailing lists and doing mailings. There is a single rate sheet for all such services, applicable alike to the eating clubs and to other outside organizations. Tiger Inn, Ivy and Cottage have used some of these services [RS181].

A review of submitted documents from the late 1960's and mid-1970's give some indications of the relationship between Princeton University and the Clubs during two time frames – just prior to the admission of women to Princeton University in 1969 and just prior to Sally Frank's admission to Princeton in 1976. In 1967, as part of the Minutes of the May 1, University Faculty Meeting, an Interim Report of the Subcommittee of the Faculty Committee on Undergraduate Life appears. The relationship between the University and the Clubs is described as follows:

> The University itself provides no dining facilities for most upperclassmen but sanctions the private eating clubs as virtually the only

dining and recreational facilities regularly made available to approximately ninety per cent of the upperclassmen. There are not alternatives in suburban Princeton or in the Wilson Society that could accommodate a large percentage of those undergrauates [sic].

Once considered tangibly "off" campus, the clubs are now visibly "on" it, surrounded by the Woodrow Wilson School, 185 Nassau Street classroom building, the University Press, the Engineering School, the Alumni Council building, Ferris Thompson faculty housing, the projected computer center, the residence of the Dean of the Chapel, the buildings (formerly eating clubs) at 5 Ivy Lane and 70 Washington Road, the astro-physics building, and the Religion and Philosophy Departments. Yet the University does not own the clubs or their land, and it does not manage their operations or purchase their supplies. Those alumni members who currently pay club dues, and any who have contributed to the purchase of the club buildings in the past, underwrite a portion of the costs of the facilities that are utilized chiefly by the undergraduates. The quality of the food, the physical facilities, and the activities vary from club to club.

The University's responsibility for the utilization of the clubs by the undergraduates is revealed in many ways. Resolutions of the Trustees have established their jurisdiction over undergraduate membership in the clubs. A week's recess is allowed in the University calendar each year for Bicker. Information on Bicker is provided for sophomores with the assistance

of the office of the Dean of Students, who exercises some supervision over the proceedings. Conduct of the undergraduate members within clubs is regulated by the University under the Gentleman's Agreement which delegates responsibility for enforcing its provisions largely to the undergraduate members and the officers of the individual clubs, under the supervision of the Undergraduate Interclub Committee. University regulations govern the board payment of scholarship students, and the University endorses an agreement that protects the financial stability of the clubs as a group by limiting the size of the membership in any one of them. The University Health Services are implementing their proposal for the inspection of club kitchens. Intramural sports for upperclassmen are organized on the basis of the clubs (and the Woodrow Wilson Society).

In sum, the University and the clubs are now mutually dependent on each other. The clubs depend on the University for an annual supply of undergraduates that virtually insures the continuance of the system; the University depends on the clubs for dining and recreational facilities. In the past, the University has exercised its responsibility for providing these facilities to upperclassmen largely by delegating it, with a minimum of surveillance and a minimum of initiative to improve the clubs. [MINUTES OF THE UNIVERSITY FACULTY MEETING OF MAY 1, 1967].

In 1973, the University proposed to the clubs a jointly funded study of the club system by Haskins and Sells. The purpose of the Study was "to outline all of the options available to develop a system of operation that

would be financially and socially viable to the clubs and to the University" [Executive Committee Minutes of Dec. 7, 1973]. The University offered to pay for at least part of the cost of the study [*Id.*]. In February of 1974, Haskins and Sells began a study of the clubs [Executive Committee Meeting Minutes of May 10, 1974].

At the June 9, 1975, Board of Trustees meeting, the Subcommittee on the Clubs presented a Progress Report to the Board. The Subcommittee met with the Graduate InterClub Council (GICC),* the Undergraduate InterClub Council (UICC),** the Undergraduate Life Committee and the Executive Committee of the Alumni Council prior to issuing the Progress Report [Progress Report at 3]. The Report noted that:

> The GICC suggested that the Board adopt a resolution expressing its support for the eating clubs. They felt that it could be of tremendous help to them in soliciting alumni and perhaps undergraduate support. The Subcommittee feels that it would be useful to create a positive atmosphere between the University and the clubs during this period of discussion and analysis. Lastly, we feel that the submission of the Board of this report provides an appropriate setting in which the Board might adopt such a resolution [Progress Report p.5].

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* The GICC is comprised of the graduate club presidents [*Rights, Rules and Responsibilities,* 1982 at 26].

** The UICC is comprised of the undergraduate club presidents [Id].

A resolution of support of the club system was unanimously approved by the Board of Trustees [Minutes, June 9, 1975].

The Haskins and Sells Study, which was released in April of 1975, was also discussed in the Progress Report of the Subcommittee on Clubs. The Progress Report included the following points made by the study:

> 1. The Clubs are no longer the only eating and social options available to upperclassmen.
>
> 2. The Clubs' financial problems are severe.
>
> 3. No quick or easy solutions exist to the financial problems facing the 11 clubs.*
>
> 4. The option of letting present market forces operate would probably decrease the number of clubs from 11 to 8. This option, however, would not be without cost to the University. The costs would include possible loss of vitality leading to further erosion of club membership; University purchase of the property to preserve the geographical integrity of the academic community; once purchased, a demand for the use of the building. A substantial decrease in club members without increases in independents would require either further expansion of the University's food service capacity or major revamping of class scheduling and dining facility assignments in order to accommodate the lunchtime demands [Progress Report at 3].

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* The eleven clubs consisted of four non-selective clubs (Campus, Colonial, Dial and Terrace) and seven selective clubs (Cap & Gown, Charter, Cottage, Ivy, Quad, Tiger and Tower) [Haskins and Sells Study].

The Progress Report also pointed out that the Haskins and Sells Study had set forth a long list of options for dealing with the problems facing the club system. "These options fall into three general categories; options requiring University policy changes, options involving only the clubs and options requiring ongoing University involvement with the Clubs" [Progress Report at 3].

By October 23, 1975, short-term actions taken by the University to assist the clubs included help in the collection of overdue accounts, the June Trustee Resolution and planning for club participation in the freshman orientation program [Minutes of the Committee on Student Life of the Board of Trustees, October 23, 1975].

In the final Report of the Princeton University Trustee Committee on Eating Clubs of April 2, 1976, the following were noted as actions that had been taken by the University [Final Report at 6]:

1. Systematic exploration of the options Haskin & Sells had outlined.

2. Adoption of the Board of Trustee resolution "reaffirming the University's view that the Club system provides an important social option for undergraduates and expressing again the sense of the Board that this form of social alternative should continue to be available."

3. "The Office of the Dean of Student Affairs has assisted the clubs in collecting overdue bills from their members."

4. "The new student handbook includes a description of the club system."

5. "Arrangements were made for a presentation on the clubs to be a part of the freshman orientation, and this proved to be quite successful."

6. "Assistance is being provided to the clubs for snow removal from their front sidewalks by University personnel."

7. "The University's centrex phone extensions are now available to the clubs."*

8. "The University has explored, and proposed to the clubs, the use of an expert in an investigation of whether or not significant savings can be achieved by a joint club insurance program."**

9. "There has also been made available to the clubs an opportunity to participate in a University food purchasing program so as to achieve for the clubs the savings that arise from bulk purchase of certain items which all clubs use."***

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* The dimension telephone system (Centrex) of Princeton University has one limited access telephone in each club for which the clubs are billed on a monthly basis by the University Comptroller and for which they pay Princeton University the same amount that New Jersey Bell charges Princeton University [RS169].

** No evidence has been submitted to suggest that Respondent Clubs ever participated in such a plan.

*** Ivy Club does not buy food or non-food items from the D.F.S. at Princeton University [RS173]. In 1979, Cottage Club bought $166.64 worth of paper products from Princeton University [RS174]. Tiger Inn did at one time purchase food and non-food items from Princeton University which involved payment of a 20% surcharge added to the price paid by the University to outside vendors [RS175].

In September of 1976, Sally Frank began attending Princeton University [RS103]. She was a student at Princeton University from September 1976 through June 1980, when she graduated [RS103].

From September 1976 through June 1980, when she graduated, petitioner, Sally Frank, did not join any of the non-selective eating clubs [RS104]. During spring 1979 bicker, Sally Frank was permitted to bicker at the Ivy Club. However, she was told by Ivy's president that she could only speak to Ivy members when there were no sophomore men waiting to speak to Ivy members. Sally Frank spoke to at least one club member at each of the bicker sessions. She did not receive a bid from Ivy [RS106]. During spring 1979 bicker, Sally Frank bickered at Tower Club and Cap & Gown.* She did not receive a bid [RS105]. During spring bicker of 1980, Tiger Inn, Cottage and Ivy refused to permit Sally Frank to bicker [RS107].

C. CONCLUSIONS

The following are conclusions based on the undisputed facts discussed above.

1. A club system provides dining facilities for a majority of upperclass students attending Princeton University.

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* The reply brief submitted by the complainant states that Ms. Frank bickered at Tower and Cap & Gown in Spring, 1980 not Spring, 1979. [Reply Brief dated 11/12/84 at 1]. The date, however, is not material to any conclusions reached by the Division.

2. Respondent clubs are part of this club system associated with Princeton University.

3. Princeton University relies on these clubs to feed a majority of their upperclass students.

4. Without the clubs, Princeton University would incur substantial costs and would have to make major changes in the provision of dining services for upperclass students.

5. Princeton University has an interest in the continued viability of the club system and has taken actions based on that interest.

6. The clubs are characterized by the clubs and Princeton University as servicing Princeton students and recruit members almost exclusively from Princeton University.

7. The clubs work with one another and with Princeton University through organizations like the C.B.A. and the Interclub Council.

8. The link that ties the individual clubs together is their association with Princeton University.

9. The clubs could not continue in their present form without Princeton University.

10. Princeton University and the clubs are integrally connected in a mutually beneficial relationship.

11. Non-members of respondent clubs, particularly but not exclusively, Princeton University students, can participate in many of the respondent clubs activities and use the respondent clubs facilities.

D. LEGAL ANALYSIS

N.J.S.A. 10:5-1 *et seq.*, the New Jersey Law Against Discrimination (hereinafter L.A.D.), guarantees to all persons "the opportunity to . . . obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of race, creed, color, national origin, ancestry, age, marital status or sex, subject only to conditions and limitations applicable alike to all persons." *N.J.S.A.* 10:5-4.* The statute makes it illegal for "any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold or deny to any person any of the accommodations, advantages, facilities or privileges thereof" based on the protected criteria. *N.J.S.A.* 10:5-12(f).

The statutory definition of a place of public accommodation includes "any restaurant, eating house or place where food is sold for consumption on the premises." *N.J.S.A.* 10:5-5(1). Respondent Clubs clearly fit within the definition since "food is sold for consumption on the premises" [CS12]. The Clubs, however, contend that they are exempt from the public accommodations provisions of the L.A.D. because the definition excludes a "bona fide club . . . which is in its nature distinctly private." *N.J.S.A.*

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* Although the complaint before the Division is based on sex, as the Court noted in *Nat. Org. for Women v. Little League Baseball* "[i]f this organization were not deemed a place of public accommodation it would be free to discriminate on the basis of race or religion as well as sex." 127 *N.J. Super.* 522, 530 (App. Div. 1974).

10:5-5(1). The issue the Division must address, therefore, is whether the Clubs fit within this exemption.*

In determining whether a place is a public accommodation or is "in its nature distinctly private," the Division and the New Jersey courts have closely scrutinized the nature and operation of the organization. *See, e.g., Clover Hill Swimming Club v. Goldsboro,* 47 *N.J.* 25 (1966). No simplistic test can be applied. *See Nat. Org. for Women v. Little League Baseball,* 127 *N.J. Super.* at 531 (being nonprofit or a membership organization doesn't make organization private); *Clover Hill,* 47 *N.J.* at 34 (requiring approval of new members doesn't make organization private). All the facts must be carefully reviewed so that "[n]o device, whether innocent or subtly purposeful, can be permitted to frustrate the legislative determination to prevent discrimination". *Clover Hill,* 47 *N.J.* at 34 quoting *Jones v. Haridor Realty Corp.,* 37 *N.J.* 384, 396 (1962).

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* Respondent, Princeton University has maintained that the Division also lacks jurisdiction over Princeton University. *N.J.S.A.* 10:5-5(1) specifically includes "any . . . college and university" within the definition of a public accommodation. Princeton University's status as a public accommodation was affirmed by the New Jersey Supreme Court in *Peper v. Princeton University Board of Trustees,* 77 *N.J.* 55, 67 (1977). Princeton University's contention, therefore, that the Division lacks jurisdiction over the University is entirely without merit. Princeton University could, under the L.A.D., use sex as a criterion in the *admission* of students, *N.J.S.A.* 10:5-5(1), and in fact did not admit women until 1969. However, once Princeton University has made the decision not to use sex as a criterion of admission, the University cannot then "refuse, withhold from or deny" to any student "the advantages, facilities or privileges of the University" on account of sex. *N.J.S.A.* 10:5-12(f).

Complainant suggests that the parameters of the private club exemption are coextensive with the constitutional protections for free association [Complainant's Brief at 11]. Respondents suggest that the Division apply the test which has been developed to define a "private club" under federal civil rights statutes [Ivy/Cottage Brief at 23; Tiger Inn Brief at 15]. The Division, however, need not determine the outer parameters of the private club exemption under *N.J.S.A.* 10:5-12(1) to resolve the issue here. Instead, the Division looks to "a significant body of authority supporting the proposition that associations that ordinarily would be exempt from laws applying to public or commercial enterprises will lose that exemption if they alter their purely private character in some significant manner." *Franklin v. Order of United Commercial Travelers,* 590 *F. Supp.* 255, 260 (D. Mass. 1984).

One significant form of alteration which courts have focused on is a close association with a non-exempt organization or institution. *See, e.g. Adams v. Miami Police Benevolent Ass'n,* 454 F.2d 1315 (5th Cir.) *cert den.,* 409 *U.S.* 843 (1972) (association held subject to 42 *U.S.C.* §1983 based in part on membership by large percentage of police officers and solicitation of new members by fellow officers on the job); *Franklin v. Order of United Commercial Travelers,* 590 *F. Supp.* 255 (D. Mass 1984) (fraternal benefit society is not exempt from state anti-discrimination law based on close affiliation with city police department and benefits received from this consensual association); *Hebard v. Basking Ridge Volunteer Fire Dep't,* 164 *N.J. Super.* 77 (App. Div. 1978) (connections between fire company and municipality and in particular the function the fire company served for municipality made company not

exempt from L.A.D. as non-profit fraternal or charitable corporation). Based on the undisputed material facts and the conclusions drawn from those facts, the Division finds that Respondent Clubs have significantly altered their purely private character through their close association with Princeton University. The clubs, therefore, are not in their nature distinctly private.

When a "private" organization is held out as serving patrons of a place of public accommodation and the place of public accommodation relies on that "private" organization to provide those services, the "private" organization has significantly altered its purely private character in a way that negates any claim of being "distinctly private". *See Hebard v. Basking Ridge Volunteer Fire Dep't,* 164 *N.J. Super.* 77. This result is necessary so that places of public accommodations "cannot avoid and undermine the law with respect to providing . . . services" by structuring the provisions of those services in a particular manner. *Hebard,* 164 *N.J. Super.* at 84.

The analysis suggested by the cases cited above is analogous to a provision in Title II, the federal public accommodation statute. 42 *USCA* §2000(a). Although Title II is narrower than the L.A.D., both in the scope of prohibited bases of discrimination, e.g., sex is not a prohibited basis under Title II, and in the definition of what is a place of public accommodation, e.g. a University is not a place of public accommodation under Title II, Title II reaches establishments integrally connected with places of public accommodation. 42 *U.S.C.A.* §2000a(b) (4) covers

> "any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment."*

For example, an independent barber shop located in the basement of a hotel, that does not solicit guests of the hotel as clients but is listed on signs in the hotel elevator showing the various services located in the hotel, is a place of public accommodation even though a barbershop is not ordinarily covered under Title II. *Pinkney v. Malloy,* 241 *F. Supp.* 943 (N.D. Fla. 1965).** This conclusion satisfies the goals of Title II "to remove discrimination in places of public accommodation . . . with respect to all the services rendered and operated within the physical

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* The L.A.D. does not have a specific statutory provision which is analogous, however, the L.A.D. has a much narrower private club exemption. Title II exempts all "private clubs" except "to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) [the definition of a public accommodation under Title II]. 42 *U.S.C.A.* §2000a(e). The L.A.D. exempts only those "bona fide clubs" which are "in their nature distinctly private". Organizations which hold themselves out as servicing a public accommodation and are in fact connected to that place of public accommodation, have undermined any claim that the organizations are *distinctly private* in their *nature.*

** Under the N.J. L.A.D., a barber shop is a place of public accommodation. N.J.S.A. 10:5-5(1).

confines which hold themselves out as serving patrons of the [public accommodation]." 241 *F. Supp.* at 947.*

The New Jersey L.A.D. is also concerned with the elimination of discrimination in "all the accommodations, advantages, facilities and privileges" of places of public accommodation. *N.J.S.A.* 10:5-4. To effectuate this concern, the Division must "deal with the substance, rather than the form of transactions, and not permit important legislative policies to be defeated by artifices affecting legal consequences of the existing situation." *Beach Associates,* 286 *F. Supp.* at 807. A careful analysis of the relationship between Princeton University and the Clubs allows the Division to look beyond the separate legal entities and in doing so the Division finds that the University and the Clubs are in reality integrally connected.

Respondent clubs are held out as part of a club system which services Princeton University students. Publications paid for by sophomore class dues and compiled by a committee of sophomore students as well as

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* In this case, the listing on the signs by the elevator appear to be the only indication of the barbershop holding itself out as serving the hotel patrons. In another case based on §2000(b) (4) (A) (iii), a beach club was said to be holding itself out as serving patrons of a carry-out food shop "by supplying the tables at which most of such patrons consume the food purchased at the shop, which provides no such facilities for those customers." *United States v. Beach Associates, Inc.*, 286 *F. Supp.* 801 (D. Maryland 1968). In *United States v. Medical Society*, 298 *F. Supp.* 145 (D.S.C. 1969) a snack bar/cafeteria and a hospital were determined to be held out as serving the same patrons based on signs in the hospital indicating the location of the snackbar/cafeteria and a booklet distributed by the hospital which noted the snackbar/cafeteria as an eating facility.

other University publications present the clubs as a dining alternative for upperclass students. Unlike eating as an "independent", having an eating club contract allows for an integration with the University dining facilities through the general meal exchange program.*

Respondent clubs solicit Princeton University students. According to their constitutions only Princeton University students can be "active" or "undergraduate" members.** To familiarize Princeton University students with the Clubs, the Clubs hold open house events, participate in the Upperclass Choice Committee meal exchange program and advertise in the University newspaper. These activities are geared exclusively toward the solicitation of Princeton University students. The exclusivity of their association with Princeton University and their use of sophomore class committees and University publications for solicitation clearly evidence the fact that the Respondent clubs are held out as closely associated with and servicing the dining/social needs of Princeton University students.

Princeton University relies on the club system to feed a majority of its upperclass students. Although some alternatives exist presently, the sheer numbers of students

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* Characterizing certain students as "independents" is informative. The terminology itself shows that the clubs are held out as more closely associated with Princeton University than, for example, commercial eating establishments in the town of Princeton.

** Tiger Inn and Cottage Club both specify "Princeton" University. Although the Ivy constitution never mentions "Princeton", Ivy has never suggested that non-Princeton students would be able to bicker at Ivy [Transcript 4/13/84 at 143].

who are fed at the clubs are evidence of the essential nature of the service provided by the clubs. Presently, Princeton has a combined seating capacity in its dining halls of approximately 1375. According to the "preferrable" and "manageable" ratios suggested in a University memorandum, this seating capacity could feed between 2290 and 2750 students. Clearly major changes would be required in University dining arrangements if an additional 1570 students holding club contracts were added to the 2645 presently holding University contracts.*

Princeton University's reliance on the clubs is not merely evidenced through a statistical analysis but is also clear from the University's continual review of the status of the clubs and University involvement in efforts to keep the club system viable. As recently as the early 1970's when the survival of the club system was in question, Princeton University proposed and jointly funded a study of the clubs. The University then took specific actions in response to that study to assist the clubs.

The relationship between Princeton University and the clubs is no doubt closer than the University would have with a completely autonomous provider of food

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* Respondents claim that if only students from the three Respondent clubs were added to the University dining facilities, the students could be easily absorbed. Respondents suggest the Division look only at this impact on Princeton University dining facilities. However, as Haskin and Sells noted, closing just three clubs could erode the entire system as well as create other financial burdens on the University. Moreover, any decision regarding jurisdiction will have implications for other clubs in the club system, not just that of Respondent Clubs.

services such as a commercial eating establishment in the town of Princeton. The picture becomes clear by looking at the various meal exchange programs, the increased loans to students for club contracts, the Interclub Agreement*, the episodes of discipline of club officers for the conduct of club members, and the interest and involvement of the University Faculty and Board of Trustees in the club system. The clubs connections with one another also suggest a less than casual relationship with Princeton University. The major link between the clubs are the close association with the University. Out of these connections numerous organizations grew such as the C.B.A. and the U.I.C.C. and the G.I.C.C. These organizations facilitate cooperation between the clubs as well as facilitate relations between the clubs and the University.

By looking to substance rather than form, one can see that the relationship between the clubs and Princeton University is one of integral connection and mutual benefit. The fact that Respondent Clubs are structured as independent legal entities can not obfuscate the depth of their true association with Princeton University. Based on this association, the Division rejects the contention that the clubs are distinctly private and therefore exempt from the L.A.D.

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* The actual existence of an executed Interclub Agreement is unresolved. However, resolution of that issue is unnecessary for our conclusion. Unsigned copies were available in the Dean's office and excerpts of the agreement were published in the University *Rules, Rights and Responsibilities* booklet. Clearly, therefore, it is held out to the students of Princeton University that the clubs and Princeton University have this cooperative disciplinary arrangement.

Respondents assert that if the L.A.D. is interpreted as reaching the Clubs, the members' constitutional rights of privacy and freedom of association would be violated. The Clubs claim an affirmative right to discriminate based on their members associational preference. After careful consideration, the Division finds that applying the L.A.D. to Respondent Clubs would not violate any constitutional rights of association.

The conflict between associational rights and anti-discrimination legislation was recently examined by the Supreme Court in *Roberts v. United States Jaycees*, ___ *U.S.* ___, 104 *S.Ct.* 3244, 82 *L.Ed.*2d 462 (1984). In *Roberts*, the Court established a framework for analyzing all freedom of association claims. Initially, the Court distinguished two types of associational rights – intimate associations and expressive associations.

> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable

> means of preserving other individual liberties. 104 *S.Ct.* at 3249.

Since Respondents have not suggested any protection as an expressive association, this discussion will focus on the associational freedoms protecting intimate associations.*

The prototypes of these intimate relationships "are those that attend the creation and sustenance of a family – marriage (citation omitted), childbirth (citation omitted), and cohabitation with ones relatives (citation omitted)." 104 *S.Ct.* at 2350. The relationships are characterized by "deep attachments and commitments to the necessarily few other individuals with whom one

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* Even if Respondents did claim protection as an expressive association, the Division would consider such a claim to be without merit. Respondents have produced no evidence to suggest that the purpose of association is to "engag[e] in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." 104 *S.Ct.* at 3249. In *Roberts*, "the Court of Appeals noted, a 'not insubstantial part' of the Jaycees' activities constitutes protected expression on political, economic, cultural, and social affairs." 104 *S.Ct.* at 3254. The Court weighed the impact on the content of the expressive communication against the compelling state interest and concluded that the Jaycees were not protected from the state anti-discrimination statute. "We are persuaded that [the state's] compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members associational freedoms." 104 *S.Ct.* at 3253. The Respondent Clubs, presenting no evidence of protected expressive activity, would clearly not be entitled to any constitutional protection as an expressive association.

shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of life." 104 *S.Ct.* at 2350.

The rights of intimate association however, do not end with the family. They extend in greater and lesser degrees to other relationships which share certain attributes with family relations. These attributes include "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship". 104 *S.Ct.* at 2350. Determining the degree of protection "entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments". 104 *S.Ct.* at 3251. Determining if a particular association is protected from a particular state intrusion also requires a weighing of the state interest involved.

The size of Respondents Clubs are far larger than the "approximately 430 members" and "400 members" in the two Jaycees chapters in *Roberts* which the court found to be "large". *Id.* The Clubs each have a combined graduate and undergraduate membership in the thousands. Clearly, then, the Clubs would be considered quite large.

The degree of selectivity involved in Respondent Clubs is no doubt greater than that exercised by the Jaycees. In *Roberts*, "a local officer testified that he could recall no instance in which an applicant had been denied membership on any basis other than age or sex". *Id.* The Respondent Clubs, on the other hand, may reject on a basis other than sex anywhere from 1/4 to almost 2/3 of

the applicants. Respondent Clubs did, however, compromise a degree of their members' associational preferences by participation in the hat bid system.* The Clubs, thus, appear to fall somewhere between the total lack of selectivity evidenced by the Jaycees and the highly selective associations such as marriage.**

Finally a crucial consideration is the degree of seclusion from others in critical aspects of the relationship. Similar to the Jaycees, "numerous non-members of both genders regularly participate in a substantial portion of activities central to the decision of many members to

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* The hat bid was in effect when Ms. Frank attempted to bicker at Respondent Clubs. If she had been a man, she might have become a member of one of the Clubs through the roll of a dice. The only selective criterion, therefore, which necessarily prevented Ms. Frank from joining Ivy, Cottage Club or Tiger Inn was her sex.

** *Cf. Villiage [sic] of Belle Terre v. Boras*, 416 *U.S.* 1 (1974); *Firefighters Institute for Racial Equality v. City of St. Louis*, 549 *F.*2d 506 (8th Cir.), *cert.* den. 434 U.S. 819 (1977). In *Belle Terre*, six students challenged a zoning ordinance which prevented them from sharing a residence. The Court specifically rejected their free association claims and upheld the ordinance although three years later the Court struck down a zoning ordinance which prohibited cohabitation of extended *family* members. *Moore v. City of East Cleveland*, 431 *U.S.* 494 (1977). In *Firefighters*, informal selective eating arrangements or "supper clubs" organized by on duty firefighters resulted in segregated eating arrangements. Although free association issues were not specifically raised, the Court not only permitted intrusion into the associations but *ordered* the Fire Department to act to prevent the continued operation of segregated clubs. 549 *F.*2d at 515. Both the students of *Belle Terre* and the "supper clubs" in *Firefighters* appear smaller and more selective than Respondent Clubs.

associate with one another." *Id.* With the Respondent Clubs, these include the Club's primary functions of meals and social activities. The associational preferences of the members are constantly diluted through the general meal exchange program, parties advertised generally to Princeton University students or available to them through passes, open houses and renting out the club for non-member use.

Therefore, despite their greater degree of selectivity, on the "spectrum from the most intimate to the most attenuated of personal attachments" *Id.*, the Clubs appear entitled a degree of protection more closely to that afforded to the Jaycees than that afforded to family relationships. This degree of protection must then be viewed in light of the compelling state interest involved in the eradication of discrimination against women.*

"By prohibiting gender discrimination in places of public accommodation, the [state anti-discrimination] Act protects the State's citizenry from a number of serious social and personal harms." 104 *S.Ct.* at 3253. This goal was clearly important to the New Jersey legislature when, in passing the L.A.D., the legislature declared that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundations of a free democratic

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* In *Roberts*, the Jaycees were so lacking in characteristics of intimate associations that the Court did not look to the state interest until reaching the speech-related associational protections. Nevertheless, the Court characterized the State interest in eradicating discrimination against women as compelling. 104 *S.Ct.* at 2353.

state . . . " *N.J.S.A.* 10:5-3. As a University, Princeton has an obligation to provide all of the advantages, privileges and facilities of the University to all students on a non-discriminatory basis. Based on Respondent Clubs relationship to the University those same obligations are applicable to the advantages, privileges and facilities of the clubs.

The eating clubs are a significant dining and social option offered to Princeton University upperclass students. However, instead of offering this option on a non-discriminatory basis, the complaint alleges that a dual system of eating options exists based on sex. Men have the full range of options available while women's options are more circumscribed. In enforcing the anti-discrimination legislation, the State has a compelling interest in "removing the barriers to economic advancement and political and social integration that have plagued certain disadvantaged groups, including women." *Roberts*, 104 *S.Ct.* at 3254. This interest is implicated by the alleged activities of Prineeton University and Respondent Clubs. In balancing this compelling state interest against the degree of protection from intrusion the Clubs are entitled to, the Division finds that free association rights would not be violated by the assertion of jurisdiction over these "private clubs" that are integrally connected with Princeton University.

II. DISCRIMINATION

The investigation reveals the following undisputed facts which are relevant to the issue of discrimination:

1. During spring 1979 bicker, Sally Frank was permitted to bicker at the Ivy Club. However, she was told by Ivy's president that she could only speak to Ivy members when there were no sophomore men waiting to speak to Ivy members.

2. During spring bicker of 1980, Tiger Inn, Cottage and Ivy refused to permit Sally Frank to bicker.

3. From time to time the undergraduate members of Tiger Inn and University Cottage Club have held informal votes on whether to admit females into the club. In each case the overwhelming majority voted against permitting women to become members.

4. The issue of admitting women to Ivy Club has never been put to a formal vote of the undergraduate members but it is the general consensus of the club that women should not be extended membership.

5. As per the clubs' directions, women bickerees received interview appointments only at the coed selective clubs while men could receive appointments at all selective clubs.

6. A woman was not eligible for a hat bid when hat bids were in existence.

7. From their inception until 1984, all members of Ivy, Cottage and Tiger Inn have been males.

8. Princeton University provides publicity for Respondent Clubs in University publications.

9. Princeton University participates in meal exchange programs with Respondent Clubs.

10. Sophomore Class dues, collected by Princeton University, are used to publish articles publicizing the clubs as well as to fund a meal exchange program in which women cannot dine at Respondent Clubs.

11. Princeton University considers the cost of club meal contracts when calculating a financial aid package for students.

12. After a jointly funded study of the club system, Princeton University took specific actions relating to the clubs, including providing centrex phone extensions and snow removal, operating a University purchasing program and passing a Board of Trustee Resolution in support of the club system.

Based upon the foregoing facts, I conclude that probable cause exists to believe that the Respondents, Trustees of Princeton University*, Ivy Club, University Cottage Club and Tiger Inn, have violated *N.J.S.A.* 10:5-4, 10:5-12(f) and 10:5-12(e) by discriminating against women in places of public accommodation and by aiding and abetting such discrimination

5/10/85
Date

/s/ Pamela S. Poff
Pamela S. Poff,
Division of Civil Rights.

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* In Answer to the Verified Complaint, Respondent, denoted in such complaint as "Princeton University," requested that the complaint reflect the correct name, the Trustees of Princeton University.

APPENDIX G

Final Decision and Order of New Jersey Division on Civil Rights

(Filed May 26, 1987)

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DKT. NO. CRT 5042-85
DCR DKT. NOS. PL-05-1678, 1679, 1680

SALLY FRANK

Complainant,

-vs-

IVY CLUB, UNIVERSITY COTTAGE CLUB, TIGER INN, AND TRUSTEES OF PRINCETON UNIVERSITY

Respondents.

ADMINISTRATIVE ACTION FINDINGS, DETERMINATION AND ORDER

APPEARANCES:

For Complainant: Sally Frank, Esq., *pro se*

For Complainant: Nadine Taub, Esq.

For Respondent Ivy Club: Barbara Strapp Nelson, Esq. (McCarthy & Schatyman, attorneys)

For Respondent Tiger Inn: Russel H. Beatie, Jr. Esq.

For Respondent University Cottage Club: Michael D. Loprete, Esq. (Crummy, Deldeo, Dolan, Griffinger & Vecchione, attorneys)

For Respondent Trustees of Princeton University: Alexander P. Waugh, Jr., Esq. (Smith, Stratton, Wise, Heher & Brennan, attorneys)

For Division on Civil Rights: Nancy Kaplen Miller, Deputy Attorney General (W. Cary Edwards, Attorney General of New Jersey, attorney)

For Department of the Public Advocate as Amicus Curiae: Louis S. Ravason, Assistant Commissioner (Alfred A. Slocum, Public Advocate)

BY THE DIRECTOR:

PROCEDURAL HISTORY

By way of background information in December of 1979, Ms. Sally Frank filed a Verified Complaint against Ivy Club, Tiger Inn and the University Cottage Club as well as Princeton University alleging discrimination based on sex in a place of public accommodation in violation of *N.J.S.A.* 10:5-12 (f). Respondent Clubs responded to the Complaint by denying that the clubs were places of public accommodations. The three clubs also asserted that their members' freedom of association rights would be violated if the Complainant was granted the requested relief. In answer to the Complaint, Princeton University denied that the University was a place of public accommodation. Princeton University also claimed the University had committed no discriminatory acts.

The complete procedural history of this case is set forth in Judge Miller's Initial Decisions, dated December 12, 1985 and June 16, 1986, and in my Order of Partial Summary Decision on Jurisdiction, dated February 6, 1986.

On January 28, 1987, the Honorable Robert S. Miller, Administrative Law Judge (ALJ) issued an Initial Decision (ID), which was received by the Division on Civil Rights on January 29, 1987.

At the request of the parties, an extension of time to file exceptions was granted by Pamela S. Poff, Director, Division on Civil Rights and certified on February 13, 1987 by the Honorable Ronald I. Parker, Acting Director and Chief ALJ, wherein the time period for Complainant to file exceptions was extended until February 27, 1987 and Respondents were given five (5) days from receipt of Complainant's exceptions to reply.

The Director observes that the parties filed exceptions and objections to the ID in a timely fashion pursuant to *N.J.A.C.* 1:1-16.4 a, b and c.

Due to the complexity of the extensive record, the number of parties and the novel issues involved which required more than the usual research, the Director requested and was granted a further extension of time until May 26, 1987 for review of the record and the rendering of her Final Decision.

Since the Issues of jurisdiction and liability have already been resolved in favor of the Complainant, the Initial Decision was to address only the question of remedies. Three separate areas of remedy are discussed in the Initial Decision: (1) the amount of pain and humiliation damages that should be awarded; (2) whether the clubs should be required to admit Sally Frank as a member; and (3) whether the clubs should be required to admit women or should be ordered to sever their ties with the University. For the reasons discussed below, the

ALJ's decision is adopted in part, modified in part and rejected in part.

PAIN AND HUMILIATION DAMAGES

In his ID the ALJ recommended that the two clubs should be jointly and severally liable for $2,500 in pain and humiliation damages. In determining this amount the ALJ confined the liability for pain and humiliation to the years that Ms. Frank was an undergraduate student at Princeton. He extended it, however, to include as forseeable not only hurtful acts by club members but also those by other students. Additionally, the ALJ mitigated the damages to be awarded by three factors. See ID at 39. These three factors were (1) Respondent's good faith belief that they were acting legally; (2) Complainant's foreknowledge of Respondents' all male policy; and (3) the generally polite and courteous treatment she received from the individual members of the clubs. The ALJ then proceeded to note that pain and humiliation damages were "the imposition of a monetary award for deterrence purposes . . . " ID. at 39.

I find that the monetary award to a Complainant for pain and humiliation is the part of a make whole remedy designed to compensate an individual for the frustration, anger and humiliation suffered. See *Zahorian v. Russell Fitt Real Estate Agency*, 62 *N.J.* 399 (1973). To view this remedy as a deterrent rather than compensation for an injury is erroneous. While the Director has the power to award penalties for violations occurring subsequent to to [sic] the effective date of *N.J.S.A.* 10:5-14.1a, pain and

humiliation damages are not a penalty but are a means of remedying an injury to a Complainant.

In determining pain and humiliation damages, the ALJ should assess the injury done to the Complainant. While the amount is clearly difficult to assess the factors used should focus on the harm suffered by the Complainant. Factoring in how the Respondents treated Complainant is, therefore, appropriate. However, it is inappropriate to look at the good or bad faith of the Respondents. That factor does not measure the extent of the injury to the Complainant but instead focuses on the deterrent aspect.

Moreover, factoring in whether the Complainant had foreknowledge of the policy is also inappropriate unless the ALJ was finding that the Complainant was less frustrated, angered or humiliated because the policy was known. In general, however, there is no reason to conclude that a victim of discrimination is any less hurt by a sign over the door which refuses him/her entry than by being told at the door that he/she cannot enter. As Complainant points out in her exceptions, using this as a mitigating factor only encourages more blatant discrimination. The purpose of the remedial portion of the statute, however, is to eradicate such discrimination and make whole its victims not to encourage more blatant acts by discriminators. See *N.J.S.A.* 10:5-12 (f), prohibiting a place of public accommodation from posting notices that persons of one sex are unwelcome. Where a Complainant encounters such blatant discrimination and is told point blank that she is unwanted because of her gender, the resulting emotional pain warrants an award of damages. Compare *Scaravelloni v. Butterfield Enterprises, Inc.*, 8

N.J.A.R. 89 (1984). Therefore, the mitigation factors which the ALJ relied on in assessing the amount for pain and humiliation are rejected.

In reviewing the record I find evidence that Complainant was made to feel uncomfortable, upset and angry as a result of Respondents' discriminatory practices and the hostility directed at her as a result of her pursuing her civil rights complaint (1T 58-59; 1T 96; 1T 124; 2T 50; 2T 55)*. I also find that while she was an undergraduate, Complainant was singled out for harassment and personal abuse within the University community, of which the clubs are a part, which was a direct result of her opposition to the discrimination practiced by Respondents (IT 85; IT 96-97; 2T 55-56). Without considering the mitigating factors erroneously cited by the ALJ, I would award Complainant $5,000 for her pain and humiliation, and I will so order. Compare *Scaravelloni, supra.*

OFFER OF MEMBERSHIP

The ALJ stated in his ID that although the Director could require that the clubs make an offer of membership to Complainant, he did not think that remedy was either appropriate or desirable. See ID at 40. He based this conclusion on four reasons. First, the Complainant's personality, etc. are not similar to those who are members of the clubs. Second, the clubs should not be forced to give up their selectivity and Complainant, if male, would not have met their selectivity requirements. Third, he was not

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* 1T refers to transcript of July 29, 1986.

2T refers to transcript of July 30, 1986.

convinced that her interest in joining the clubs was sincere. In fact, Ms. Frank testified that during her sophomore year, she decided to bicker only to force the clubs to go coed. It was only after that experience that she began to desire membership as a way of interacting with other club members. The ALJ's other reason was that:

> The law does not favor the retroactive imposition of new standards of membership, *Hebard v. Basking Ridge Fire Co., No. 1*, 164 *N.J. Super.* 77 (App. Div. 1978, certif. den. 81 *N.J.* 294 (1979), nor a remedy which in fact creates a form of reverse discrimination. *Flanders v. William Paterson College of N.J.*, 163 *N.J. Super.* 225 (App. Div. 1978). To do that, or to create a sinecure for a person who has been offended by an act of discrimination, would "profane" the estimable policy and purpose of the law. *Talman v. Board of Trustees*, at 540.

On this issue I find that the ALJ reached the proper conclusion that such a remedy, although within the power of the Director to order, should not be ordered under the facts of this case. The ALJ, having the opportunity to observe the demeanor of the witness during testimony, was not persuaded that Complainant had a sincere and genuine desire to be a member of the club.* This conclusion is supported by the fact that Complainant was generally opposed to the entire club system. Furthermore, Complainant's personality and interests are such

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* This fact does not negate Complainant's right to damages for the humiliation which she suffered. Complainant's situation can be analogized to that of a tester in a housing discrimination case. *Havens Realty Corp. v. Coleman*, 455 *U.S.* 363, 373 (1982).

that had Ms. Frank been a male, she would not have received an offer of membership. Under the circumstances, therefore, Complainant will not be granted membership as a part of a make whole remedy.

However, the ALJ's discussion that such a remedy would be the retroactive imposition of new standards of membership or would create reverse discrimination is unclear and is rejected. The clubs are hereby advised that unless it can be demonstrated that a woman would not have been offered membership if she was male, an order requiring an offer of membership would clearly be appropriate.*

ORDER ADMITTANCE OF WOMEN OR SEVERANCE OF TIES

The final issue addressed by the ALJ was whether the clubs should be required to admit women or whether they should be ordered to sever the ties that connect them with Princeton University thereby taking themselves outside the jurisdiction of the Law Against Discrimination. The ALJ found that the severing of ties was the better choice and recommended that the clubs and Princeton University be ordered to sever their ties. I find that the reasoning in the ALJ's ID with respect to the severing of

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* The clubs are further put on notice that a person's opposition to the clubs' all male policy cannot be a basis for excluding the person (male or female) from membership. To do so would violate the retaliation provisions of the LAD. This appears to have been a factor in their consideration of new members.

ties is fundamentally flawed and I reject his recommendation. The clubs will be ordered to admit women in future membership selections.*

The ALJ initially spends over three pages of the initial decision reviewing federal law in the area. More specifically he discusses the fact that Congress "plainly expressed its intention to exclude college social organizations from the reach of federal anti-discrimination legislation". ID at 42. The conclusion he draws from the express exemption in the federal scheme is "it is not unreasonable to suppose that . . . [the New Jersey Legislature] may also have intended to exempt fraternities, sororities and other CSO's". ID at 42. This conclusion runs counter to both the ALJ's initial decision on jurisdiction and my jurisdictional decision of February 6, 1986, and goes beyond the scope of the issue before the ALJ, namely the appropriate remedy in this case.

The New Jersey Legislature has often modeled provisions of its anti-discrimination legislation after federal provisions. See, e.g., Governor's Reconsideration and Recommendation Statement, A 1042 – *L.* 1985 c. 73

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* I note that not only has the Complainant filed exceptions opposing severance as a remedy but Princeton University has also filed exceptions opposing the ALJ's recommendation that the clubs and the University be ordered to sever their ties. Princeton argues that "the University should not be ordered to sever the limited 'ties' specified by the Office of Administrative Law, since to do so would fail to sever the important relationships that exist between the Clubs and the University, make the University an unwilling partner to gender discrimination, and run counter to the University's educational objectives." Princeton Exceptions at 3.

reprinted at *N.J.S.A.* 10:3-1 ("The retirement allowance threshold . . . should be reduced . . . so that the exemption conforms with a similar provision within the federal Age Discrimination in Employment Act"). In the area of exemptions for private clubs, however, New Jersey has clearly chosen language reflecting a narrower exemption in spite of the broader federal language. Proper statutory interpretation would lead to the conclusion that by not incorporating a specific exemption, the Legislature, in fact, chose not to have such an exemption. Furthermore, in my initial jurisdictional decision issued as part of the finding of probable cause, I specifically addressed the broader federal exemption and concluded that the New Jersey exemption was narrower.

The ALJ's discussion on the First Amendment rights of the clubs is also rejected as inconsistent with the jurisdictional finding. In the Finding of Probable Cause (FPC), which was incorporated in my February 6, 1986 ruling (Partial Summary Decision at 7), I specifically addressed the clubs' First Amendment claims of freedom of association rights and found that any rights that they may have to freely associate did not include a right to discriminate on the basis of sex. The ALJ's reliance on free association rights is therefore misplaced. My February 6, 1986 ruling is hereby reaffirmed. See *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 55 *U.S.L.W.* 4606 (U.S. May 5, 1987).

The ALJ further erred in ordering the clubs to sever ties to Princeton University rather than ordering them to admit women. A careful review of the jurisdictional decision, as Princeton clearly points out in its exceptions, makes it "apparent that the relationship upon which the Director relied extends far beyond those ties which the

Respondent clubs seek to sever . . . " Princeton Exceptions at Appendix A, ii, and which the ALJ ordered their clubs to sever. In this regard, I modify the ALJ's Finding of Fact #37 on p.26 of the I.D. by adding to it those additional Findings of Fact contained in pp.1-36 of the Finding of Probable Cause in this matter. One of the key factors in the jurisdictional decision was that the "clubs are held out as part of a club system which services Princeton students". FPC at 41. Yet as Princeton points out in its exceptions, the ALJ does not recommend that they alter that relationship. To begin with, there is "no recommendation that the Respondent clubs sever their relationship with Princeton by opening their doors to members from other colleges and universities." Princeton Exceptions, Appendix A, ii. Also, "[a]lthough bicker is an integral part of the club system for selective clubs, the OAL made no recommendation that the Respondent clubs . . . withdraw[ ] from the bicker process." *Id.* Furthermore, the sophomore class committee that runs bicker produced publications that "are an integral part of the bicker process and help funnel Princeton's students to the clubs . . . [yet] the OAL . . . made no recommendation that they sever the ties embodied and fostered by these non-university publications". *Id.* at iii. The various organizations that link the clubs to one another were significant to the director's finding of jurisidiction, see FPC at 35 and 44, and yet the ALJ did not require the clubs to withdraw from these interclub organizations. Additionally, although ordered to stop meal exchange programs with Princeton, the ALJ did not require the interclub's meal exchange program to be stopped nor did he address "the larger question of the Respondents' role in feeding

Princeton undergraduates which helped to create the jurisdictional relationship in the first place". *Id.* at iv. These ties between the clubs that link the Respondent clubs to the club system at Princeton University are as significant if not more significant than the ties noted by the ALJ.

In addition to the ALJ's recommendation being so clearly inconsistent with the jurisdictional findings, the ALJ also misrepresents the choices at issue. He suggests that the alternative to ordering the clubs to sever ties is to "compel the clubs to maintain their symbiotic ties" or to "forbid Respondents from changing their relationship with Princeton . . . " ID. at 45. "If those tangible ties can be severed, I see no compelling reason to forbid it." Id. at 47. The question however is not whether the clubs should be *compelled* to remain tied to Princeton but whether the Director should be *ordering* the severance of those ties so that the clubs can continue to discriminate. The clubs could have already severed those ties suggested by the ALJ on their own but have chosen not to do so.

The entire basis for the ALJ's conclusion that it is better to sever the ties is, as discussed *supra,* based on faulty premises and is inconsistent with the prior determination of the Director on jurisdiction. Moreover, his recommended remedy is inconsistent with the explicit language of the statute regarding remedies as well as the policies underlying the statute. The ALJ's recommended remedy is therefore rejected. The clubs will not be ordered to sever their ties. they will be ordered to admit women.

Since it is already determined in this matter that the clubs are within the jurisdiction of the Law Against Discrimination (LAD) and that they have, in fact, violated the law, the only question is that of remedy. The statute provides:

> If, upon all evidence at the hearing the director shall find that the respondent has engaged in any unlawful employment practice or unlawful discrimination as defined in this act, the director shall state his findings of fact and conclusions of law and *shall issue* and cause to be served on such respondent *an order requiring such respondent to cease and desist from such unlawful* employment practice or unlawful *discrimination and to take such affirmative action, including,* but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership, in any respondent labor organization, or *extending full and equal accommodations, advantages, facilities, and privileges to all persons, as, in the judgment of the director, will effectuate the purpose of this act,* and including a requirement for report of the manner of compliance. [*N.J.S.A.* 10:5-17 (emphasis added)].

Given the mandatory language of the statute, it is questionable whether the Director has the discretion not to order that the clubs admit women. But more significantly, in light of the purpose of the Law Against Discrimination and the broad construction given the statute as remedial legislation, see *Zahorian, supra; Jackson v. Concord Company,* 54 *N.J.* 113 (1969), it would be inconsistent with the goal of the Legislature to eradicate discrimination, if I were not to order the clubs to admit women.

The LAD was created "to prevent and eliminate" discrimination *N.J.S.A.* 10:5-6. "The legislative intent was to create an effective enforcement agency which would serve towards eradication of the 'cancer of discrimination.' " *Zahorian, supra,* at 412. Such a mandate requires the elimination of discrimination that violates the law, not the privatization of such discrimination. Even assuming for the sake of argument that the clubs could avoid the jurisdiction of the LAD by severing certain ties with Princeton, ordering these clubs out of the jurisdiction of the Division would undermine rather than effectuate the purposes of the statute. It would be comparable to ordering Clover Hill Swimming Club to stop advertising instead of ordering the club to admit blacks or ordering the Little League to become more selective instead of ordering the group to admit females. See *National Organization for Women v. Little League Baseball,* 127 *N.J. Super.* 522 (App. Div. 1974) aff'd mem. 67 *N.J.* 320 (1974); *Clover Hill Swimming Club v. Goldsboro,* 47 *N.J.* 25 (1966).* It would be akin to ordering a discriminating landlord to cease renting apartments instead of ordering him to rent to unmarried women. See *Zahorian, supra.* This would be inconsistent with the purpose of the statute and with basic principles of law enforcement. The clubs have been found to be places of public accommodation, subject to the strictures of the LAD, and I have found that they

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* Attempts to privatize discrimination to allow it to continue is not new. In the 1960's to avoid integration of public schools, one county shut down the school system, replacing it with private schools. The Supreme Court, however, recognizing the discriminatory intent, ordered that the public schools be reopened. *Griffin v. County School Board,* 377 *U.S.* 218 (1984).

discriminate against women, in violation of the statute. A violation having been found, the Respondent clubs will be ordered to cease their discriminatory practices. It is beyond the scope of this cease and desist order to offer Respondents an advisory opinion as to possible ways by which they might avoid compliance with the LAD.

Having determined that the clubs will be ordered to admit women, I now turn to a question that the ALJ did not address – whether Princeton should be required to monitor compliance. It is my judgment that at this point no formal monitoring scheme is necessary. Cottage Club, which went coed in settlement, has already conducted a coed bicker and, according to the testimony before the ALJ, considered women candidates fairly. This was so despite the fact that the undergraduates in the club had been against the change and that it had been forced upon them by the graduate board. Given their good faith conduct and the testimony at the hearing that Ivy and Tiger would comply with any final order to admit women, I think it appropriate to rely on the good faith of the members of those two clubs to comply with my order without presently providing for specific monitoring by the University.

It is therefore on this ___ day of May 1987, hereby ORDERED that:

1. Respondents shall cease and desist from the doing of any act prohibited by the New Jersey Law Against Discrimination as set forth under *N.J.S.A.* 10:5-1 *et seq.*, and more specifically, Ivy Club and Tiger Inn shall cease and desist from excluding women from membership in their clubs.

2. Respondents Ivy Club and Tiger Inn shall be held jointly and severally liable for the sum of $5,000 in compensatory damages for the humiliation and pain Complainant suffered as a result of Respondents' discriminatory acts. A check in the amount of $5,000 shall be made payable to Sally Frank and forwarded to the Division on Civil Rights, Room 400, 1100 Raymond Boulevard, Newark, New Jersey 07102 within forty-five (45) days after receipt of this Order for transmittal to Complainant.

3. If the check mentioned in paragraph 2 above is not received within the prescribed time interest will run at 7.5% or such other amounts designated by the Court Rules from the date of this Order and continue during the pendency of this case.

4. Respondent clubs shall admit women in all future membership selections. Although Respondents may be selective in their membership practices, an applicant's gender or his/her past or present opposition to the clubs' all male policy cannot be a basis for excluding the person (male or female) from membership.

5. Respondent clubs are required to permit women to bicker, and to admit women for membership with the same courtesies, privileges and accommodations as males. Moreover, the selection process shall not apply to females any different standards for qualification than those applied to males.

6. Princeton University will not be required to presently monitor compliance by Ivy Club and Tiger Inn for the reasons set forth in this decision.

7. Respondents Ivy Club and Tiger Inn shall report in writing to the Division for the next two years, by June 15, 1988 and June 15, 1989, on the number of women admitted to membership during the 1987-88 school year and the 1988-89 school year.

8. Complainant, under the circumstances of this case, will not be granted membership in the clubs as a make whole remedy for the reasons expressed herein.

9. Complainant may apply to the Director for attorneys fees incurred in connection with this matter. Prior to submitting any such application, Complainant's attorney shall confer with Respondents' attorneys to attempt to stipulate to the amount of the fees.

10. Jurisdiction is retained by the Division on Civil Rights to observe and require compliance and to issue Supplemental Orders, if necessary to insure compliance with the foregoing provisions of this Order.

/s/ Pamela S. Poff
PAMELA S. POFF, DIRECTOR
DIVISION ON CIVIL RIGHTS

DATED: May 26, 1987

APPENDIX H

Statutes and Constitutional Provision Involved

New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-12(f):

> "It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
>
> . . .
>
> For any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, or directly or indirectly to publish, circulate, issue, display, post or mail any written or printed communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, or privileges of any such place will be refused, withheld from, or denied to any person on account of the race, creed, color, national origin, ancestry, marital status, sex or nationality of such person, or that the patronage or custom thereat of any person of any particular race, creed, color, national origin, ancestry, marital status, sex or nationality is unwelcome, objectionable or not acceptable, desired or solicited and the production of any such written or printed communication, notice or advertisement, purporting to relate to any such place and to be made by any owner, lessee, proprietor, superintendent or manager thereof, shall be presumptive evidence in any action that the same

was authorized by such person; provided, however, that nothing contained herein shall be construed to bar any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex, and which shall include but not be limited to any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution which is restricted exclusively to individuals of one sex, from refusing, withholding from or denying to any individual of the opposite sex any of the accommodations, advantages, facilities or privileges thereof on the basis of sex; provided further that the foregoing limitation shall not apply to any restaurant as defined in R.S. 33:1-1 or place where alcoholic beverages are served.

New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-5(l):

"A place of public accommodation" may include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the

premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post-secondary school from using in good faith criteria other than race, creed, color, national origin or ancestry, in the admission of students.

42 *U.S.C.* § 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of

any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of District of Columbia.

Amendment I of the U.S. Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX I

Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing, with Suggestion for Rehearing En Banc

(Filed September 16, 1991)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-6027

THE IVY CLUB

V.

W. CARY EDWARDS; PAMELA S. POFF,
Appellants

SALLY FRANK,
Intervenor-Defendant

SALLY FRANK,
Counter-Claimant

V.

THE IVY CLUB,
Counter-Defendant

SUR PETITION FOR REHEARING

(Filed 9-16-91)

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and ROSENN, *Circuit Judges*.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

DATED: September 16, 1991

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* Senior Judge Rosenn voted only as to panel rehearing.